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Interstate Mining Compact Commission

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January 14, 2003

RECEIVED
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DIV. OF OIL, GAS & MINING

MEMORANDUM

TO: **Environmental Affairs Committee**

FROM: **Greg Conrad**

RE: **Update on Bonding Initiatives**

You may recall from our last meeting in Annapolis in November that IMCC has been involved in (or has been monitoring) several initiatives involving bonding requirements related to mining. Most directly, IMCC filed comments last October with the Office of Surface Mining (OSM) regarding an Advance Notice of Proposed Rulemaking (ANPR) that addressed the issue of bonding and other financial assurance mechanisms for treatment of long-term pollutional discharges associated with acid mine drainage (AMD). Copies of the OSM notice and IMCC's comments are attached. IMCC also met with OSM and other interested parties to discuss the status of reclamation bond availability in July of last year. The minutes of that meeting were forwarded to you via my memo of July 25, 2002.

As a result of our discussions in July, we agreed to pursue several key issues with OSM and prepare discussion papers on the topics, which included the use of dedicated trust funds; regulatory flexibility to accommodate alternative bonding mechanisms; separating land and water bonding requirements; and deciding when AMD bonding should be required. We have also been looking at the concept of a priming lien for states in bankruptcy proceedings where bond moneys are involved in order to protect and secure the states' interests. At our meeting in November, the member states requested that I make these discussion papers available to all of the states once they were in final form. I have now received the last of the four papers, and all four are enclosed with this memo for your review and information.

A conference call of the Bonding Work Group (which includes OSM) was held in December and it was decided that we would await further decisions by OSM regarding bonding issues before moving forward with additional discussions. OSM is in possession of all four draft discussion papers and is awaiting release of a report from the Interior Department's Bonding Task Force. We expect that sometime thereafter, OSM will make some decisions about next steps. We will meet again with OSM at that time to determine which issues are worth pursuing.

In the meantime, there may be other initiatives that IMCC may want to pursue on its own, particularly in the noncoal sector, with regard to bonding and financial assurance. Some states had suggested at the meeting in November that IMCC facilitate a symposium with the mining and bonding industry to discuss issues related to noncoal bonding requirements. The mining industry (via the National Mining Association) has approached us about the potential of meeting to discuss various bonding concerns that they are facing and the types of solutions that might effectively address them. I would welcome your thoughts about other actions that IMCC might undertake, separate from our work with OSM, to address current or anticipated bonding issues – especially in the noncoal arena.

I have also enclosed several other documents related to bonding that may be of interest to you. One is a reason court decision by Judge Haden in West Virginia concerning the bonding program in West Virginia, which had been under scrutiny by OSM. In his decision, Judge Haden rejected most of the challenges by the environmental plaintiffs to OSM's approval of a program amendment by West Virginia that addresses the alleged deficiencies in its alternative bonding system. Of particular interest in the decision is a statement by the court on page 13 where the judge notes as follows: "The parties agree on one point: water treatment for pollutional discharges, including AMD, is a perpetual requirement." This broad statement could prove problematic for other parties in the future.

Also enclosed are three charts developed by the National Mining Association: one addresses state alternate bonding systems; the second addresses acceptable forms of bond or financial assurance among the states; and the third presents various industry proposals for changes to OSM's and the states' bonding rules. I would encourage the coal primacy states to review the first two of these charts. If you find inaccuracies or omissions, please let me know so that I can pass them on to NMA for correction.

Once you have had an opportunity to process all of this information (I know there is a lot), please let me know how you would like IMCC to proceed. As I mentioned earlier, we are currently in a "wait and see" mode with OSM. However, we can certainly move in other directions if we so choose. Furthermore, on the noncoal side, there are any number of initiatives that we could pursue to address bonding concerns that you may have. I welcome your thoughts and input.

Enclosures

to A in the amount of $100,000 for A's attorney's fees and the other payable to C in the amount of $200,000. P writes the checks in accordance with A's instructions and delivers both checks to A. P must file an information return with respect to A for $100,000 under paragraph (a)(1) of this section.

Example 4. Check made payable to claimant, but delivered to nonpayee attorney. Corporation P, a defendant in a suit for damages knows that C, the plaintiff, has been represented by attorney A throughout the proceeding. P settles the suit for $500,000. Pursuant to a request by A, P writes the $500,000 settlement check payable solely to C and delivers it to A at A's office. P is not required to file an information return under paragraph (a)(1) of this section with respect to A, because there is no payment to an attorney within the meaning of paragraph (d)(4) of this section.

Example 5. Multiple attorneys listed as payees. Corporation P, a defendant, settles a lost profits suit brought by C, for $1,000,000 by paying a check naming C's attorneys, Y, A, and Z, as payees in that order. Y, A, and Z are not related parties. P delivers the payment to A's office. A deposits the check proceeds into a trust account and makes payments by separate checks to Y of $100,000 and to Z of $50,000, for their attorneys' fees. A also makes a payment by check of $550,000 to C. P must file an information return for $1,000,000 with respect to A under paragraphs (a)(1) and (b)(1)(i) of this section. A, in turn, must file information returns with respect to Y of $100,000 and to Z of $50,000 under paragraphs (a)(1) and (b)(2) of this section if A is not required to file information returns under section 6041 with respect to A's payments to Y and to Z.

Example 6. Amount of the payment—attorney does not provide TIN. Corporation P, a defendant, settles a suit brought by C for $1,000,000 of damages. C's attorney, A, did not furnish P with A's TIN. P is required to deduct and withhold tax from the $1,000,000 under section 3406(a)(1)(A) and paragraph (e) of this section. Therefore, P makes the payment by a $720,000 check naming C and C's attorney, A, as joint payees. P must also file an information return with respect to A under paragraph (a)(1) of this section in the amount of $1,000,000, as prescribed in paragraph (d)(5) of this section.

Example 7. Home mortgage lending transaction. (i) Individual P agrees to purchase a house that P will use solely as a residence. P obtains a loan from lender L to finance a portion of the cost of acquiring the house. L disburses loan proceeds of $325,000 to attorney A, who is the settlement agent, by a check naming A as the sole payee. A, in turn, writes checks from the loan proceeds and from other funds provided by P to the persons involved in the purchase of the house, including a check for $800 to attorney B, whom P hired to provide P with legal services relating to the closing.

(ii) P, not L, is the payor of the payment to A under paragraph (d)(3) of this section. P, however, is not required to file an information return with respect to A under paragraph (a)(1) of this section because the payment was not made in the course of P's trade or business. Even if P made the payment in the course of P's trade or business, P would not be required to file an information return under section 6045(f) with respect to A because P is excepted under paragraph (c)(6) of this section.

(iii) A is not required to file an information return under paragraph (a)(1) of this section with respect to the payment to B because A is not the payor as that term is defined under paragraph (d)(3) of this section. Also A is not required to file an information return under paragraph (b)(2) with respect to the payment to B because A was listed as sole payee on the check it received from P. See section 6041 and its regulations for whether A or L must file information returns under that section. See section 6045(e) and § 1.6045–4 for whether A is required to file an information return under that section.

Example 8. Business mortgage lending transaction. The facts are the same as in *Example 7* except that P buys real property that P will use in a trade or business. P, not L, is the payor of the payment to A under paragraph (d)(3) of this section. P, however, is not required to file an information return under section 6045(f) with respect to A because P is excepted under paragraph (c)(6) of this section. A is not required to file an information return under paragraphs (a) or (b)(2) of this section with respect to the payment to B. See section 6041 and its regulations for whether P or L must file information returns under that section. See sections 6041 and 6045(e) for rules regarding whether A is required to file information returns under those sections.

Example 9. Qualified settlement fund. Corporation P agrees to settle for $100,000,000 a class action lawsuit brought by attorney A on behalf of a claimant class. Pursuant to the settlement agreement and a preliminary order of approval by a court, A establishes a bank account in the name of Q Settlement Fund, which is a qualified settlement fund (QSF) under § 1.468B–1. A is also designated by the court as the administrator of the QSF. Corporation P writes a $100,000,000 check in 2003 to A, who deposits the check proceeds into the Q Settlement Fund. In 2004, the court approves an award of attorneys' fees of $35,000,000 for A. In 2004, Q Settlement Fund delivers a $35,000,000 check payable to A. P is required to file an information return under paragraph (a) of this section with respect to A for the year 2003 for the $100,000,000 payment it made to A. The Q Settlement Fund is required to file an information return under section 6041(a) and § 1.468B–2(l)(2) with respect to A for the year 2004 for the $35,000,000 payment it made to A.

Example 10. Bankruptcy trustee—wage garnishment. Individual C files for bankruptcy under Chapter XIII of the Bankruptcy Code, 11 U.S.C. sections 1301–1330. Pursuant to a wage garnishment order, C's employer, P, withholds $800 from C's earnings. P remits a check for $800 payable to A, an attorney who was appointed by the United States Bankruptcy Court to act as the trustee of C's bankruptcy estate. P is required to file an information return under section 6045(f) with respect to the $800 payment it made to A.

(g) *Cross reference to penalties.* See the following sections regarding penalties for failure to comply with the requirements of section 6045(f) and this section:

(1) Section 6721 for failure to file a correct information return.

(2) Section 6722 for failure to furnish a correct payee statement.

(3) Section 6723 for failure to comply with other information reporting requirements (including the requirement to furnish a TIN).

(4) Section 7203 for willful failure to supply information (including a taxpayer identification number).

(h) *Effective date.* The rules in this section apply to payments made during the first calendar year that begins at least two months after the date of publication of these regulations as final regulations in the **Federal Register**.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 02–12464 Filed 5–16–02; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 773, 780, 784 and 800

RIN 1029–AC05

Bonding and Other Financial Assurance Mechanisms for Treatment of Long-Term Pollutional Discharges and Acid/Toxic Mine Drainage (AMD) Related Issues

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are seeking comments on what types of financial guarantees will best ensure adequate funding for the treatment of unanticipated long-term pollutional discharges, including acid or toxic mine drainage (collectively referred to as AMD), that develop as a result of surface coal mining operations. Specifically, we are interested in views from all parties on how we can best address the proper level of treatment and number of years to use in calculating financial assurance amounts for AMD, appropriate financial mechanisms to cover treatment costs, and suggestions on appropriate enforcement in cases where financial assurance is not fully adequate for the long term, but AMD is still being treated. We also invite comment on

whether codification of our AMD policy statement would be helpful.

DATES: To ensure consideration, we must receive your comments on or before July 16, 2002.

ADDRESSES: You may mail or hand carry comments to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240. You may also e-mail comments to *osmrules@osmre.gov*.

FOR FURTHER INFORMATION CONTACT: Ruth Stokes, Program Support Directorate, Office of Surface Mining Reclamation and Enforcement, on 202–208–2611.

SUPPLEMENTARY INFORMATION:

I. Background

What Do the Law and Related Regulations Require?

Section 509(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), requires that each applicant for a permit to conduct surface coal mining operations file a performance bond to guarantee compliance with all requirements of the Act and the permit. The Act specifies that the bond amount must reflect the probable difficulty of reclamation, considering a number of factors, one of which is hydrology. It also requires that the bond be sufficient to assure completion of the reclamation plan if the work had to be performed by the regulatory authority.

Paragraphs (b) through (d) of section 509 of the Act specifically recognize surety bonds, self-bonds, cash, negotiable Federal or State bonds, and negotiable certificates of deposit as acceptable forms of bond. Section 509(e) of the Act requires that the regulatory authority adjust the bond terms and amount from time to time as affected acreage increases or decreases or when the cost of future reclamation changes. Our regulations implementing the requirements of the Act may be found in the Code of Federal Regulations at 30 CFR part 800.

When a regulatory authority issues a permit, the regulatory authority envisions that the permittee will conduct mining in accordance with the approved permit and the operation will meet all requirements of the Act and the regulatory program. In practice we have found that events occur during mining and reclamation that were not anticipated during development of the reclamation plan. Some of those events result in violations of the Act or regulatory program and corrective actions can be taken to eliminate the violation. Other unanticipated events, such as the formation of acid or toxic mine drainage, require long-term treatment and are not easily addressed. For purposes of this Advance Notice, the acronym "AMD" includes both acid and toxic drainage from surface coal mining and reclamation operations, consistent with our AMD Policy Statement.

We have been involved in litigation in recent years pertaining to, among other things, the requirement for financial assurance for the long-term treatment of AMD, and the evaluation of the adequacy of the financial guarantee for long-term treatment. Our current regulations recognize certain acceptable forms of bond. We did not envision the complexity of the issues associated with financial assurances for long-term treatment of AMD. Those complexities suggest the need for financial mechanisms more appropriate to address a long-term commitment to treat AMD.

We are issuing this Advance Notice of Proposed Rulemaking to seek comment on whether we should codify the following requirements: (1) That only permits where the operation is designed to prevent off-site material damage to the hydrologic balance and minimize both on- and off-site disturbances to the hydrologic balance will be approved, and (2) that financial responsibility associated with AMD should be fully addressed. We are also requesting input from all parties on how we can best address the proper level of treatment and number of years to use in calculating financial assurance amounts for AMD, appropriate financial mechanisms to cover costs, and suggestions on appropriate enforcement in cases where financial assurance is absent or not fully adequate for the long-term, but AMD is still being treated.

How Does This Notice Relate to our AMD Policy Statement?

The prevention of future AMD from coal mining operations into surface and ground waters and the remediation of mining-related pollutional discharges are high priorities of the Office of Surface Mining Reclamation and Enforcement. To advance these priorities, we developed policy goals, objectives, and strategies to protect the hydrologic balance in coal mining areas from the effects of AMD. This was done after extensive input from primacy States, other Federal agencies, the environmental community, industry representatives and coalfield citizens concerned about AMD. The policy statement adopted in March 1997 can be found in its entirety on our home page at *http://www.osmre.gov/amdpol.txt*, or a copy may be obtained from the individual listed under **FOR FURTHER INFORMATION CONTACT.**

Our policy statement identified goals for environmental restoration and environmental protection. Under each goal were objectives. The policy principles that we are considering codifying under this effort pertain to Objectives 1 and 2 under the goal "Environmental Protection" as follows.

Objective 1: Only approve permits where the operation is designed to prevent off-site material damage to the hydrologic balance and minimize both on- and off-site disturbances to the hydrologic balance. In no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of a postmining pollutional discharge that would require continuing long-term treatment without a defined endpoint.

Strategy 1.1—Predictive techniques should be used to identify and characterize the site-specific acid-or toxic-forming conditions posing a risk of AMD formation.

Strategy 1.2—Each mining and reclamation plan should specifically address identified acid- and toxic-forming conditions and demonstrate how off-site material damage will be prevented and on- and off-site disturbances minimized without the use of techniques that require long-term discharge treatment without a defined endpoint.

Strategy 1.3—Each permit should include adequate measures, such as prevention and mitigation technologies, to control and manage identified acid- or toxic-forming AMD conditions and to protect the quality and quantity of surface and ground water systems during mining and reclamation.

Strategy 1.4—Regulatory authorities should establish criteria to measure and assess material damage. Material damage guidelines, to be applied on a case-by-case basis, are necessary to effectively assess the adequacy of mining and reclamation plans in addressing AMD prevention.

Strategy 1.5—Approved permits should include a monitoring plan for determining whether the operation and reclamation plans are being effectively implemented.

Objective 2: Financial responsibility associated with AMD should be fully addressed.

Strategy 2.1—Prior to permit issuance, adequate financial assurance should be provided to ensure completion of the hydrologic reclamation plan.

Strategy 2.2—If, subsequent to permit issuance, monitoring identifies acid- or toxic-forming conditions which were not anticipated in the mining and operation plan, the regulatory authority should require the operator to adjust the financial assurance.

Strategy 2.3—Where inspections conducted in response to bond release requests identify surface or subsurface water pollution, bond in an amount adequate to abate the pollution should be held as long as water treatment is required, unless a financial guarantee or some other enforceable contract or mechanism to ensure continued treatment exists.

This is our long-standing policy, which we believe correctly interprets the law. We invite comment on whether codification of these principles would be helpful to the public.

II. Level of Treatment To Use in Calculating Financial Assurance Amounts for AMD

Both section 509(a) of SMCRA and the implementing regulations at 30 CFR 800.14(b) require that the amount of bond posted for a permit be sufficient to assure completion of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture. If post-mining pollutional discharges develop, the permittee's reclamation liability extends to the abatement or long-term treatment of the discharge and continues as long as treatment is needed. Before treatment costs can be calculated, the appropriate treatment standard must be established.

Under section 702(a) of SMCRA and court decisions interpreting that provision, we have no authority to deviate from effluent limits and other water quality standards established under the Clean Water Act. In our experience, National Pollutant Discharge Elimination System (NPDES) permitting authorities generally establish effluent limits for bond forfeiture sites on a case-by-case basis after forfeiture has occurred. The SMCRA regulatory authority will not know what those limits are at the time that treatment costs must be determined to establish the appropriate amount of the bond or other financial assurance. However, the SMCRA regulatory authority does have an independent responsibility under sections 510(b)(3) and 515(b)(10) of SMCRA to protect the hydrologic balance. Accordingly, we are seeking input on the appropriate level of treatment upon which financial assurance amounts should be calculated.

Specifically:

(1) What standards should be used to determine water treatment, such as effluent limits or other water quality standards, in the calculation of financial assurance amounts?

(2) What role should we, States, and permittees have in calculating treatment costs?

III. Number of Years To Use in Calculating Financial Assurance Amounts for AMD

Another major factor in the calculation of financial assurance amounts for AMD is the length of time. In rare cases, technical analysis of a given discharge may be able to define (predict) the time over which pollution loading will cease so that treatment will no longer be needed. Absent that determination, the discharge is an indefinite or "perpetual" liability for the permittee.

Over the past several years, we have been discussing this issue with state regulatory authorities. The application of bonding to treatment of discharges requires that the length of time be specified in calculating overall long-term treatment costs. This is necessary in order to establish revenue needs based upon the present value of future annual treatment costs. We, in Tennessee, and several state regulatory authorities have been working with bond adjustment requirements to address the cost of long-term treatment of pollutional discharges, including interest-bearing options such as trust funds. At this time, we are seeking input on the appropriate number of years upon which financial assurance amounts should be calculated.

Specifically:

(1) What timeframe should be used to calculate long-term treatment costs for those sites without a defined endpoint? Please provide a detailed rationale for your suggested timeframe.

(2) What role should we, States, and permittees have in determining the timeframe for calculating treatment costs?

IV. Financial Mechanisms Available To Assure Funding for Long-Term Treatment of AMD

The bond forms prescribed in 30 CFR 800.12 (collateral bond, surety bond, and self-bond) do not necessarily lend themselves well to bonds for water treatment costs because of the lengthy timeframes involved and uncertainties associated with the AMD treatment obligations. In addition, surety and collateral bonds may involve high up-front costs or collateral requirements.

We discussed the acceptance of other types of financial mechanisms when we stated in the preamble to 30 CFR 700.11(d) that jurisdiction over a mine site with a pollutional discharge may be terminated only if "a contract or other mechanism enforceable under other provisions of law" provides for treatment and all other performance standards are met. *See* 53 FR 44361–62; November 2, 1988. We also recognized this principle in our March 31, 1997, AMD Policy Statement.

We are seeking input on what types of financial instruments or combinations of instruments are both appropriate and available for financial assurance of long-term treatment of AMD. We encourage commenters to address the following questions:

(1) What types of financial instruments are available to cover long-term AMD treatment costs? How do they work? What are the optimal terms for each? What is the estimated annual cost to the permittee?

(2) Is insurance coverage an option to cover unanticipated AMD costs? If so, please provide the details, estimated cost, and the timing of when a policy should be obtained.

(3) If available, should an insurance policy be considered as a backup to other forms of financial assurance?

(4) What types of contracts and other enforceable mechanisms would provide adequate assurance of continuing treatment?

(5) Please describe any changes in, or new, regulations and/or statutory provisions that you believe would be necessary to implement your suggestions.

V. Enforcement

At present, when a postmining pollutional discharge requiring long-term treatment develops, our AMD Policy and regulations (30 CFR 800.15) provide that the regulatory authority must order the permittee to adjust the bond to reflect the increased reclamation costs. However, this approach may not be the most effective or environmentally beneficial strategy. First, there may no longer be any active mining within the permit area when the discharge develops. Under those conditions, the regulatory authority has less leverage to obtain the increased bond amount because the prohibition in 30 CFR 800.11(c) against disturbance of areas before posting the required performance bond has no impact. Second, insisting on immediate posting of the increased bond amount may provide permittees who are treating the discharge but cannot afford the increased bond an incentive to cease operations and abandon the site rather

than continue the treatment of the discharge.

We are seeking comments on appropriate enforcement of the financial assurance requirement for treatment of discharges that occur after mining begins. Specifically:

(1) What enforcement action should be taken in situations where a pollutional discharge develops while mining is still occurring and the permittee is treating the discharge but the bond or other financial assurance is inadequate to ensure treatment of the discharge in the event of forfeiture?

(2) What enforcement action should be taken in situations where a pollutional discharge develops after mining is completed and the permittee is treating the discharge but the bond or other financial assurance is inadequate to ensure treatment in the event of forfeiture?

(3) Should we develop timeframes for bond adjustment (and sanctions for non-adjustment) similar to those of the bond replacement regulations at 30 CFR 800.16?

We welcome your comments on these and other relevant issues on the costs of AMD treatment and forms of financial assurance.

Dated: May 10, 2002.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 02–12462 Filed 5–16–02; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 913

[IL–099–FOR]

Illinois Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Illinois regulatory program (Illinois program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The Illinois Department of Natural Resources, Office of Mines and Minerals (Department or Illinois) is proposing revisions to and additions of regulations about definitions, areas designated by Act of Congress, criteria for designating areas as unsuitable for surface coal mining operations, requirements for permits and permit processing, coal exploration, and performance bond release. Illinois also proposes to correct or remove outdated references in several regulations. Illinois intends to revise its program to be consistent with the corresponding Federal regulations and to clarify ambiguities.

This document gives the times and locations that the Illinois program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., e.s.t., June 17, 2002. If requested, we will hold a public hearing on the amendment on June 11, 2002. We will accept requests to speak at a hearing until 4 p.m., e.s.t. on June 3, 2002.

ADDRESSES: You should mail or hand deliver written comments and requests to speak at the hearing to Andrew R. Gilmore, Director, Indianapolis Field Office, at the address listed below.

You may review copies of the Illinois program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Indianapolis Field Office.

Andrew R. Gilmore, Director, Indianapolis Field Office, Office of Surface Mining Reclamation and Enforcement, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Room 301, Indianapolis, Indiana 46204. Telephone: (317) 226–6700.

Illinois Department of Natural Resources, Office of Mines and Minerals, Land Reclamation Division, 300 W. Jefferson Street, Suite 300, Springfield, Illinois 62701. Telephone: (217) 782–4970.

FOR FURTHER INFORMATION CONTACT: Andrew R. Gilmore, Director, Indianapolis Field Office. Telephone: (317) 226–6700. Internet: *IFOMAIL@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Illinois Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Illinois program on June 1, 1982. You can find background information on the Illinois program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Illinois program in the June 1, 1982, **Federal Register** (47 FR 23858). You can also find later actions concerning the Illinois program and program amendments at 30 CFR 913.10, 913.15, 913.16, and 913.17.

II. Description of the Proposed Amendment

By letter dated April 8, 2002 (Administrative Record No. IL–5077), Illinois sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Illinois sent the amendment in response to a letter dated August 23, 2000 (Administrative Record No. IL–5060), that we sent to Illinois in accordance with 30 CFR 732.17(c). Illinois also included some changes at its own initiative. Illinois proposes to amend its surface coal mining and reclamation regulations at Title 62 of the Illinois Administrative Code (IAC). Below is a summary of the changes proposed by Illinois. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

A. 62 IAC 1701 Appendix A Definitions

1. Illinois proposes to delete its definition of "Interagency Committee." Illinois is removing this definition because Illinois Public Act 90–0490 abolished the Interagency Committee in 1997.

2. Illinois proposes to remove the existing language from its definition of "valid existing rights" and to add a reference to the new definition of "valid existing rights" at 62 IAC 1761.5.

Interstate Mining Compact Commission

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October 9, 2002

Jeffrey D. Jarrett
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Mr. Jarrett:

The Interstate Mining Compact Commission (IMCC) is pleased to submit these comments concerning the Office of Surface Mining's Advance Notice of Proposed Rulemaking (ANPR) published in the Federal Register on May 17, 2002 at 67 Fed. Reg. 35070. As you know, IMCC represents 20 states from across the country, 16 of whom implement federally approved surface mining programs pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The topic of bonding and other financial assurance mechanisms for treatment of long-term pollutional discharges is one that has occupied a significant amount of our attention over the past several months, especially as we have worked with OSM and others to craft potential approaches that will effectively address the matter. In this regard, I want to specifically reference the on-going efforts of a state/OSM working group that is meeting on a regular basis to explore potential approaches and solutions to the long-term treatment issue. We are hopeful that this working group will continue to serve as a forum for future deliberations as we seek answers to this often elusive issue.

Our comments respond directly to the four topical areas discussed in the ANPR on page 35072 of the Federal Register and the questions posed under each topic. Some of our responses are admittedly general in nature, due primarily to the fact that this issue does not lend itself to easy answers. As several respondents have noted, there is no single ideal solution that will fully address how we handle bonding for long-term treatment scenarios. In fact, it will likely require a variety of bonding or other financial mechanisms, together with regulatory flexibility and innovativeness, to adequately resolve the dilemma that faces regulatory authorities, surety companies and the mining industry. Our hope is that some of the ideas and suggestions we raise in our comments will move us in the right direction and that, working in partnership with OSM and other affected parties, we can find solutions that are reasonable, workable and affordable.

Level of Treatment To Use in Calculating Financial Assurance Amounts

Before we can answer the two questions that are posed by OSM under this topic, the states believe that two key questions must be answered first: 1) what are we measuring (or treating) for? and 2) where are you measuring? The question of what is "long-term treatment" for purposes of determining applicable treatment standards must be answered before moving on to determining what the standards should be. This question has proven to be problematic for both OSM and the states and is central to the entire debate about bonding for long-term treatment scenarios. We believe OSM should develop a uniform standard, with state input, regarding those situations that are clearly defined as "long-term" in nature and that should be addressed as such. We are aware of situations in some states where acid mine drainage (AMD) that is encountered but never leaves the minesite is not deemed a long-term treatment candidate. We have also seen situations where the AMD seep is so insignificant, that even where it leaves the site, it is totally assimilated into the receiving stream with no measurable impacts. Thus, before we define the applicable treatment standards, it is important to define what amounts to a treatable pollutional discharge.

Once a framework (uniform standards) for defining what constitutes long-term treatment is in place, we believe the actual determination (using that framework) is a state determination, consistent with the principles of primacy. This determination will obviously also be important for purposes of deciding the need for additional, supplemental or separate bonds.

Finally, in terms of applicable standards for calculating financial assurance amounts, we agree with OSM that for active mining operations, there is no authority to deviate from effluent limits as established under the Clean Water Act. However, for forfeiture sites, we believe the applicable standards should be worked out at the state level, and ideally in coordination with the surety company, on a case-by-case basis. In West Virginia, for instance, we know of situations where OSM has suggested something less than effluent limitations if there is no significant off-site impact. This determination for forfeiture sites will be critical, given the potential impacts on available funding for reclamation and treatment. Finally, where sulfides and chlorides are an issue, a further complication arises with regard to the applicable standards. But even in these situations, we believe the determination is best left to the states, in coordination with the surety companies.

In terms of the calculation of treatment costs, we believe this is a site-specific decision appropriately left to the states who should work with permittees on active sites and with experts and/or consultants at forfeiture sites to determine actual costs. An example of site-specific calculations based on expert information are those determined from spreadsheets developed by West Virginia University. OSM's role would be one of oversight and providing technical assistance to the states.

Number of Years to Use in Calculating Financial Assurance Amounts

The importance of determining the number of years to use in calculating financial assurance amounts is that it defines the boundaries within which a decision regarding the bonding or financial assurance requirement is made as it relates to treatment. This is primarily a state determination. We have found that if there are discharges with no endpoint in sight, many calculations show that 75 years is the appropriate number for purposes of determining financial assurance, unless the permittee can demonstrate otherwise, since after 75 years there are diminishing returns in terms of treatment. Whatever number is chosen, however, it does not necessarily imply that this will drive the resolution of funding amounts or mechanisms. Again, there is no single funding formula or financial mechanism that can address every AMD treatment scenario. While dedicated trust funds have found increasing favor among some states where long-term treatment is an issue, there are other bond adjustment approaches that bear promise, including escrow accounts, state-sponsored bond pools, letters of credit, finite risk insurance, corporate guarantees or captive bond pools, and environmental insurance – or some combination of the these mechanisms. These are just some of the approaches that the state/OSM bonding work group have been investigating and will continue to look closely at over the coming months. Under each of these approaches, the number of years related to long-term treatment will be one of the key factors to be considered in designing the best solution to fit the circumstances and will therefore require in depth analysis.

Financial Mechanisms Available to Assure Funding for Long-Term Treatment of AMD

As indicated above, the state/OSM bonding work group is discussing and studying several financial mechanisms that may prove useful in addressing funding for long-term treatment of AMD. Some of the additional mechanisms or approaches that we believe are worth exploring are the following:

- developing a priming lien provision applicable to bankruptcy proceedings, pursuant to which states would have the "priming lien" in such proceedings, thereby protecting their bonding interests in bankruptcy proceedings. If state law were to give a priming lien to the state, then bonding companies could enforce state law and protect the state's interest with regard to reclamation and treatment.
- adjust OSM's existing bonding rules to provide maximum flexibility to the states regarding bonding alternatives. The idea is to put a framework in place that will allow the states to use different approaches as they are developed in an effort to meet new bonding challenges, without running afoul of either existing OSM or state regulations.
- explore state financial guarantees for the Phase 3 bonding requirement, thereby eliminating the long "tail" that tends to accompany traditional bonds. These guarantees, however, would be separate from treatment liability.
- explore a provision for limiting liability for any parties involved in long-term treatment (i.e. a "Good Samaritan" provision applicable to both SMCRA and the Clean Water Act). The idea is to focus on environmental remediation and protect those who do the work from

finding themselves a Potentially Responsible Party (PRP) in terms of continuing pollutional discharges that they have not caused by gross mismanagement or fraud.

- we believe it is also important to emphasize at every stage of the permitting and mining process the importance of abatement when AMD is first discovered, in an effort to avoid long-term treatment scenarios.
- we also believe there is merit in examining the potential to separate the traditional land reclamation bonding requirements from those that are applicable to water treatment, especially post-reclamation. This would include an analysis of jurisdictional authorities and responsibilities under SMCRA and the Clean Water Act; OSM's current bonding requirements; and OSM's termination of jurisdiction rule.

IMCC believes that the ultimate resolution of the long-term treatment issue lies in a combination of these potential approaches and mechanisms. It is for this reason that we have advocated a continuing working relationship with OSM to explore each of them in turn and to fashion the most effective solution for the greatest number of parties.

Enforcement

Part of the concern in the area of enforcement is determining or knowing when AMD occurs and then what to do about it in terms of abatement or treatment. We need to focus on both of these aspects to a greater degree, especially in terms of requiring abatement as soon as possible in an effort to avoid long-term treatment scenarios. As long as abatement is occurring (not as a result of a notice of violation) or treatment is being undertaken, we would not advocate the use of NOV's or cessation orders, even if there is inadequate bond, as it would only exacerbate the problem. We believe it is appropriate to provide the operator an opportunity to address both the abatement and/or treatment aspects of AMD and ideally to secure additional bond or other financial assurance before taking any enforcement action. However, if the operator fails to do any of these things, then we must initiate appropriate enforcement action.

Many of these enforcement questions are dependent on the answers to the former issues regarding whether there is a long-term treatment issue and the length of time that treatment is expected to continue. Therefore, it is incumbent on both OSM and the states to continue working together to resolve these issues as part of any enforcement strategy. In many ways, we believe OSM has answered many of the questions it poses regarding enforcement in its discussion under paragraph V on page 35072 of the ANPR. In the end, it will be important for the states to be able to exercise maximum flexibility, especially with regard to new and different financial assurance mechanisms. This is why it is necessary for OSM's rules to accommodate this regulatory flexibility.

Finally, it should be noted that enforcement is a state determination and we do not want to lock ourselves into certain conditions that require us to respond in a certain way. Rather, the states need flexibility and discretion to work within the context of each unique on-site situation and to consider the various potential financial assurance mechanisms that may apply.

Codification of AMD Policy Statement

OSM has inquired in the ANPR as to whether the agency should codify the AMD Policy Statement. The IMCC states do not recommend codification. The policy statement should be maintained as is, with maximum flexibility in its implementation and interpretation by the states. We have engaged in extensive discussions with OSM over the years regarding the nature and implementation of the AMD policy statement and believe that, under the circumstances, little will be gained by codification of the statement at this time and it is best left as a policy statement.

We appreciate the opportunity to present these comments and look forward to working with OSM on the various issues associated with bonding for long-term treatment of AMD. While a difficult and somewhat elusive topic, we believe that with time we will be able to fashion solutions that are workable, affordable and effective for all parties involved. Should you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,

Greg Conrad

Gregory E. Conrad
Executive Director

MINUTES

IMCC Bonding Work Group
Conference Call – December 10, 2002 – 3:00 p.m. EDT

A conference call of the IMCC Bonding Work Group took place at 3:00 p.m. EDT on December 10, 2002. Participants on the call included John Carey (MD), Ruth Stokes (OSM), Joe Pizarchik(PA), Lewis Halstead (WV), Butch Lambert (VA), Pam Grubaugh-Littig (UT), David Berry (CO), and Greg Conrad (IMCC) who served as facilitator. The primary purpose of the call was to review several draft documents that had been prepared by members of the work group to further expand upon various issues raised during previous discussions related to bonding for long-term treatment scenarios.

The call began with an update from Ruth Stokes of OSM regarding the Department of Interior's Bonding Task Force. A draft report is being circulated internally within the Task Force for review and DOI hopes to have the report available in early 2003.

Members of the Work Group reported on the bonding situation in their respective states since the group's last conference call in September. The general perspective was that, although sureties are requiring more in the way of collateral and premiums are more expensive, mining companies are still able to get bonds. The market continues to tighten, but there does not appear to be a severe crisis. In West Virginia, the Special Reclamation Fund Advisory Council is preparing to meet this week and will soon be issuing its report to the legislature regarding the status of the special reclamation bond fund and tax. Also, there has been more interest in incremental bonding by larger mining companies in West Virginia. Virginia recently submitted proposed program amendments to OSM regarding bond release enhancements. Pennsylvania is in the process of moving several operators to the next phase of the Commonwealth's increased bond requirements by having the operator's post additional bond or setting up a trust fund.

The Work Group next discussed the drafts that had been prepared on various issues related to long-term treatment, as follows:

- Dedicated Trust Funds (prepared by PA) – Joe Pizarchik clarified that these trust funds are intended to allow an operator to terminate jurisdiction under SMCRA and are not considered new "bonds". He answered several questions regarding implementation of these trust funds in Pennsylvania. He noted that even where bankruptcy proceedings have been involved, the Commonwealth has been able to secure reclamation bond moneys and even personal property for the trust funds, based on arguments that these assets are being used to preserve the environment and address long-term water treatment issues.

- Separating Land and Water Bonds (prepared by OSM) – several suggested revisions, in the way of clarifications, were suggested by the Work Group regarding this draft by OSM. The changes related to the use of the term "contract"; the need to differentiate between bonding requirements and termination of jurisdiction; and the use of risk-based bonds where AMD was anticipated but never occurs. Ruth Stokes agreed to work with Joe

Pizarchik to incorporate the suggested revisions and to provide a revised version of the document to the Work Group.

- Regulatory Flexibility (prepared by UT) – there was a fair amount of discussion about the applicability of this draft to situations where termination of jurisdiction was an issue, especially in the context of trust funds. It was agreed that this issue would be addressed in OSM's draft, rather than here.

- When Should AMD Bonding Be Required? (Prepared by MD) – there were no changes suggested to this draft.

It was agreed that three of the drafts were complete as written and did not require any further adjustments or revisions. OSM agreed to adjust its draft, as indicated above.

Greg Conrad also noted that the National Mining Association (NMA) had prepared a chart listing several suggested approaches for regulatory adjustments, a copy of which was provided to the Work Group. It was agreed that this chart provided a valuable overview of industry's concerns and could serve as the basis for discussions with both the mining and surety industries in the future.

In terms of next steps, the Work Group agreed that the best approach would be for OSM to take the four documents that had been prepared by the Work Group and to present them to the OSM Management Council along with the analysis of comments received on OSM's Advance Notice of Proposed Rulemaking (ANPR), which Ruth Stokes was in the process of preparing. Ruth expects that the analysis of comments should be ready by around the end of January and that the analysis would be presented to the Management Council shortly thereafter, along with the Work Group's documents. The Work Group would await further action pending OSM's reaction to all of these documents.

The Work Group stands prepared to work with OSM in terms of suggested next steps from the Management Council. Greg Conrad is available to meet with the Council at their request. Among the potential next steps that were discussed by the Work Group were the following: a meeting with the mining and surety industries to discuss in further detail their suggestions for bonding in general and our approaches to long-term treatment; a benchmarking workshop or symposium for state and federal personnel to discuss all aspects of the bonding program (bond calculation; bond types and methods; long-term treatment scenarios); and a meeting of the Work Group to pursue issues identified by the Management Council and/or to prepare for either of the two types of meetings suggested above. Ruth Stokes will keep the Work Group posted on developments and there will be further communications (either via conference call or e-mail notification) following the OSM Management Council briefing.

There being no further business to come before the Work Group, the conference call adjourned at 4:30 p.m.

Draft November 12, 2002

PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF MINING AND RECLAMATION

Financial Assurance and Bond Adjustments for Mine Sites with PostMining Discharges

PURPOSE:

The purpose of this policy is to set forth how the bonding laws are implemented for sites with a postmining discharge by establishing guidelines for bond adjustment and for the establishment of trust funds by the permittee to insure the long term treatment of the postmining discharges.

APPLICABILITY:

This guidance applies to surface coal mining, underground coal mining and coal refuse disposal permits with postmining discharges.

BACKGROUND

The Pennsylvania Surface Mining Act, the Clean Streams Law, the Coal Refuse Disposal Control Act, and regulations require all sites to be adequately bonded and the bond conditioned that the permittee/operator shall faithfully perform all of the requirements of the law, including reclamation. The courts have held reclamation includes treatment of postmining discharges. The permittee is liable for and is required to continue the treatment of the postmining discharge for as long as the discharge exists. The law also requires that the bond amount be sufficient for the Department to complete the reclamation in the event the permittee does not.

Satisfying the legal bonding requirements requires the permittee to provide for the cost of treating any pollutional postmining discharge for as long as the discharge may exist. Many discharges will exist for a very long time, if not perpetually. Treatment costs include the annual operation and maintenance costs of a treatment facility and the costs to replace the treatment system or components as needed.

When a postmining pollutional discharge occurs, the Department has the obligation and authority to require an amount of bond necessary to complete reclamation, restoration and any abatement work. If additional bond is needed, the Department requests the permittee provide additional bond, surety or collateral, at the permittee's option. Bonds are not the ideal financial instrument for ensuring the long term treatment of a postmining pollutional discharge. Bonds are finite in nature and inherently unable to keep up with inflationary growth. Every five years when the permit is renewed the permittee must provide additional bond to keep pace with inflation. Finally, due to the uncertain term

and the fact it is highly unlikely the bond will ever be released, most permittees will be unable to purchase the necessary surety bonds to meet their legal obligations.

As an alternative to bonds, Section 4(d.2) of the Pennsylvania Surface Mining Act authorizes the Department to establish alternative financial assurance mechanisms which meet the purposes and objectives of the bonding program. One alternative financial assurance mechanism established by the Department is a trust fund. Those permittees unable or unwilling to purchase a surety bond or a collateral bond can establish and fund a trust with a third-party trustee to manage investments and dispense funds. The main purpose of the trust fund is to generate sufficient income to cover the annual cost of treatment into the future. The Department is the irrevocable beneficiary of the trust. The trust is to be established using the Department forms containing the terms and conditions established by the Department.

The Department will adjust the amount of the reclamation bond held for mine sites with postmining discharges where the present guarantees are either insufficient or excessive. The amount needed for postmining discharges will be calculated based on the cost to the Department to treat the discharge in perpetuity. In addition to the treatment amount, there must be an amount for any remaining reclamation on the permit area.

. In the event the permittee defaults on its legal obligations to treat the discharge, the trust funds will be used to treat the mine discharge. The trustee will make disbursements at the direction of the Department.

Where more than one discharge exists on a mine site, both the individual and cumulative impacts of the discharges will be evaluated before adjusting or releasing bonds. One trust can be established for all of the discharges associated with a mine site or for all of a permittee's discharges.

When a postmining pollutional discharge occurs the regulations now provide the operator/permittee must:

1. Provide immediate interim treatment.
2. Take the measures which are available and necessary to abate the discharge
3. If the abatement measures are not successful, make provisions for the sound future treatment of the discharge. Provisions for the sound future treatment of the discharge include the design, approval and construction of a treatment facility and providing the financial assurance necessary to provide for the cost of treatment in perpetuity. The necessary financial assurance can be a bond (surety or collateral, which will be increased every 5 years) or a trust fund.

PROCEDURE

I. FINANCIAL ASSURANCE

Determining the Bond Amount

The bond amount is based on the cost to the Department to continue treatment in the case where a permittee ceases treatment. The bond amount is the amount required to provide money to pay for the treatment in perpetuity. When a bond is forfeited and collected, the money is deposited in the Surface Mining Conservation and Reclamation Fund, which is managed by the State Treasurer in accordance with law which generates a very conservative rate of return. Consequently, the amount of a bond is greater than what would be needed in a trust where the fund is invested on the open market. Because a bond has a fixed value, to provide financial assurance through the term of the permit (five years) and to account for the time it takes to complete the bond forfeiture process (about a year), the bond amount is determined by using the treatment trust calculations and projecting forward to the sixth year after permit issuance. The required bond amount is the projected trust value in year six. At the end of the permit term a new bond value for the next six years will be calculated and additional bond will be required.

Treatment Trust Calculations

The fundamental question is, "How much money needs to be invested to produce the income to pay for the costs for treatment?"

Four factors determine the value of a trust fund to provide for the costs associated with treating postmining discharges. These are: the annual operation and maintenance costs, the recapitalization costs, inflation, and the rate of return on the invested funds. In addition, it is prudent to have a mechanism in place to account for normal fluctuations in the earnings of the investment (volatility).

The cost for treatment is determined by the Department where a bond is posted. For trust funds the cost is determined by the Department and agreed to by the permittee.

Annual Operation and Maintenance

The annual operation and maintenance (O&M) costs are all those costs and expenses associated with the day-to-day operation and maintenance of the treatment facility. Operation costs include, but are not limited to: reagents, electricity, labor (including benefits), water sampling, sludge removal and disposal, transportation, maintenance of access roads, mowing, snow removal, general upkeep and contingency costs. System maintenance costs include, but are not limited to cleaning influent and effluent channels, inspecting the berms for rodent holes and repairing them, correcting short-circuiting in the ponds, repairing and maintaining all equipment and buildings. The treatment system must be sampled at least monthly to insure proper operation.

Costs are determined, where possible, using the permittee's actual annual costs. The average of the permittee's costs for the three most recent years will be used to account for variations associated with variable flow conditions. The permittee can establish it's annual operation and maintenance costs by providing an accounting of the costs prepared in accordance with Generally Accepted Accounting principles and accompanied by an affidavit of the treasurer or other corporate officer responsible for the financial affairs of the permittee and accompanied by an affidavit iv the permittee's president attesting to the completeness and accuracy of the costs. The annual operation and maintenance costs should be verified by using available treatment cost calculation models. In those cases where the actual annual costs are unavailable or unreliable, the output from the treatment cost calculation models will be used for the initial calculations. This cost may need to be increased to reflect the cost for the trustee to contract for the work. Calculating accurate costs is critical to establishing the necessary trust amount.

Capital Improvement/Recapitalization Costs

Capital improvement or recapitalization costs are those costs associated with replacing existing facilities as they meet the end of their useful lifespan. The present value of the recapitalization costs is calculated by determining the expected average lifespan of each major component of the treatment facility and its cost in today's dollars. These costs are then inflated to each expected replacement point and the present values of the future costs are added together.

Costs are calculated for replacement for a 75-year period. The required amount of recapitalization costs is recalculated on an annual basis and each time a distribution payment is made from the trust. An evaluation of financial data shows that calculations projected through 75 years result in a sufficient amount of funds for perpetuity.

For passive treatment systems, operator data should be compared to other published cost data. For example, the former U.S. Bureau of Mines calculated the cost of wetlands built by them to average about $35,000 per acre.

Inflation

Inflation is the overall general upward price movement of goods and services in an economy. The Department has determined that an inflation rate of 3.1 % is to be used in the trust fund calculations. This rate of inflation was determined through averaging the rate of inflation as reported by the U.S. Bureau of Labor Statistics for the 75-year period from 1923 through 1997. This 75-year period represents the post-World War I period when the economy of the United States changed from an agrarian economy to the modern industrial economy. It also includes a variety of changes in the inflation rate that may reasonably be expected to occur in the future.

Return on Investment

Return on investment is the growth in the value of the trust due to income from its investments, less any fees. The expected rate of return on investment is directly related to the amount of risk the investor is willing to assume. This risk, and the correlating effective rate of return, can be modified based on the mix of investment vehicles used. In order to make the establishment of treatment trust funds affordable, the Department will consider a fairly aggressive growth trust strategy consisting of up to 80% stocks and 20% bonds. The permittee can select a more conservative investment strategy. The investment mix is a decision that the permittee must make. Historically, the rate of return for stocks listed on the New York Stock Exchange (NYSE) composite index is 11.2%, and the average rate of return for bonds is 5.25%.

Volatility

Volatility is the day-to-day variation of the value of the investments from the anticipated value. Based on a volatility analysis conducted for the Department, the assumed volatility for stocks listed on the NYSE composite index is 20%. Combining that with an assumed volatility for bonds of 0%, the volatility factor for an 80 % stock, 20 % bond investment strategy would be 16%. A fully funded trust with the 80 % stock, 20% bond mix is 116% of the required funds.

Calculating the Trust Amount

The initial trust amount is determined by using a variation of the time value of money formula. The time value of money formula determines the present value of the costs to be incurred in the future. The formula is embedded in a spreadsheet, which calculates the costs, adjusted for inflation. The balance of funding in the trust is also calculated by the spreadsheet.

The following equation is used to calculate the Present Value (PV) of the future operation and maintenance (O&M) of the treatment system:

$$PV_{om} = (A/[E-I]) + A$$

Where:

PV_{om} = Present Value of the O&M Costs

A = Current Actual Annual Treatment Cost

E = Expected annual earnings/Interest Rate (depends on investment strategy)

I = Inflation Rate (assumed to be 3.1% or .031)

The total trust amount needed is the sum of the present value of the operation and maintenance costs and the present value of the capital improvement/recapitalization costs, adjusted for volatility. The following formula is used:

$Trust = (PV_{om} + PV_{cap}) \times Vol$

Where:	PV_{om}	=	Present Value of the O&M Costs
	PV_{cap}	=	Present Value of the Recapitalization Costs
	Vol	=	Volatility

Establishing the Trust

The trust is established through two documents, a Consent Order and Agreement between the Department and the permittee and a Trust Agreement between the permittee and a trustee selected by the permittee and approved by the Department. The trustee must be a Pennsylvania chartered or a national bank or a financial institution with trust powers or a trust company with offices located within the Commonwealth and the trust activities must be examined or regulated by a state or federal agency.

The trust has two sub-accounts, one for operation and maintenance (the Primary Trust), and another for capital improvements/recapitalization (the Capital Improvement Account).

Once a trust has been established and is fully funded the bonds for the site may be released. A sample public notice for bond release when a trust is in place is included as Appendix A. In addition, after the trust is fully funded, the permittee can, at the direction of the DEP, be reimbursed at the end of each year, based on the calculated cost of treatment, for that year's costs.

If the permittee is not able to fully fund the trust, then any reclamation bonds not needed to cover land reclamation may be amended and converted to an asset of the trust. If bonds are included in the trust, then, as the trust increases in value, bond may be released as the trust reaches certain milestones. For surety bonds to be part of the trust, written authorization of the surety is required. A standard surety bond rider is used to amend the surety bond.

The trustee is required to provide quarterly statements of the activity and balances of the trust. The trustee is paid from the trust. Any tax on the earnings of the trust is to be paid by the permittee. A nontaxable charitable trust can be used, or established, in which case the earnings of the trust would not be taxable. The trust can own property, easements, and equipment.

The trust has a target value that is higher than the required value to account for the volatility. In addition, the annual treatment cost is in the trust account for a year before

the permittee is reimbursed at the end of the year. The interest earned on these funds may be adequate to fund the Capital Improvement Account.

For permittees with multiple sites with discharges, it is advantageous to handle them in a single trust. Combining the money for the future treatment of multiple discharges into one trust fund can result in lower trustee fees.

Each year the costs associated with treating the discharge and the value of the trust are analyzed to determine if the objective of the trust is being met. This is a financial review which includes a detailed accounting of costs. If it is determined that the trust value is insufficient or excessive, then appropriate adjustments are made to the trust. The details of the financial requirements of the trust are somewhat complex. They are specifically described in the Consent Order and Agreement and Trust Agreement.

An annual meeting with the Department, Trustee and permittee is required by the Consent Order and Agreement to review the performance of the treatment system, and evaluate the trust amount. If the costs for treatment change by more than 10% then the trust amount should be recalculated.

The Trust provides for annual disbursement to the operator. The disbursement is limited to calculated costs and subject to fund valuation. The reimbursement is the smaller of the annual treatment costs or the excess value in the trust.

The standard form trust agreement and Consent Order & Agreement are available at:

http://www.dep.state.pa.us/dep/deputate/chiefcounsel/forms.htm

APPENDIX A

PUBLIC NOTICE

Notice is hereby given that (Company Name) has requested bond release for Surface Mine Permit No. (permit #) pursuant to the Surface Mining Conservation and Reclamation Act. The permit was renewed on (date) and is located (location of site), (township) Township, (county) County. Bond release of ($ amount) is requested for (# of acres) acres. Total bond held is ($ amount). The release area has been reclaimed to approximate original contour and revegetated with grasses and legumes. Land reclamation was completed on the site as of (date). There is a post mining pollutional discharge which has occurred and which is being treated by (description of treatment being used). Pursuant to a Consent Order and Agreement with the Department authorized by Sections 4(d.2) and (g)(3) of the Surface Mining Act and by the Clean Streams Law, a trust fund has been established and funded as an alternative financial assurance mechanism, which provides for the sound future treatment of the pollutional discharge.

Written comments, objections, and requests for a public hearing or informal conference may be submitted to the Department of Environmental Protection, Office Name, District Mining Office, Bureau of District Mining Operations, Office address, within 30 days following the fourth and final publication of this notice, and must include the person's name, address, telephone number, and a brief statement as to the nature of the objection.

Bonding Work Group – Draft Working Document

Issue: Examine the potential to separate the traditional land reclamation bonding requirements from those that are applicable to water treatment, especially post-reclamation.

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires that, as a prerequisite for obtaining a coal mining permit, a person must post a reclamation bond to ensure that the regulatory authority will have funds to reclaim the site if the permittee fails to complete the reclamation plan approved in the permit. Section 509 of SMCRA contains the requirements for performance bonds. SMCRA integrates the protection of water resources as an aspect of reclamation in Sections 508 and 519. Section 508 establishes reclamation plan requirements and requires that measures be taken during the mining and reclamation process to assure the protection of the quality and quantity of surface and ground water systems. Section 519 sets forth bond release procedures, and requires an evaluation prior to bond release of whether pollution of surface and subsurface water is occurring, and if so, cost of its abatement.

The Department of Interior, OSM, States and the IMCC, recently met on separate occasions with surety and mining industry representatives and associations to discuss the availability of surety bonds for coal mining operations. During those discussions, it was stated that one feature of coal reclamation bonds that makes it unattractive to the surety industry is the obligation to cover environmental problems, such as AMD, that is not known or anticipated when a bond is posted. Once an event occurs, the bond is required to cover that liability and there is no end to the obligation until bond release.

One way to address this concern is to separate the land reclamation bond amount from that required for water treatment. There are several factors to consider when examining the issue of separate bonds, specifically, the timing of when the financial instruments will be separate—at permit issuance, during mining, or during reclamation.

A. Separate bonds at permit issuance.

The prevention of future acid and toxic discharges from coal mining operations into surface and ground waters and the remediation of mining related pollutional discharges are high priorities of OSM. OSM's March 1997 AMD Policy Statement contains, among other things, two key principles related to long-term treatment of AMD and financial assurances.

> *Only approve permits where the operation is designed to prevent off-site material damage to the hydrologic balance and minimize both on- and off-site disturbances to the hydrologic balance. In no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the*

formation of a postmining pollutional discharge that would require continuing long-term treatment without a defined endpoint.

Financial responsibility associated with AMD should be fully addressed.

The need for codification of these two principles is one of the issues currently being considered by OSM in its Advance Notice of Proposed Rulemaking.

As OSM and State regulatory authorities make progress in prevention and correction of acid/toxic mine drainage, the financial responsibility associated with AMD has received increased emphasis.

Posting separate bonding mechanisms at the time of permit issuance puts both the operator, financial institution(s) and regulatory authority in the best situation to cover an unanticipated event. However, since the policy is to not issue a permit if such an event is likely, there is no requirement for an operator to post a separate financial assurance to cover a long-term pollutional discharge since it is not expected to occur.

Factors in considering separate bonds at the initial permitting stage include:

1. Does the operator view an unanticipated long-term pollutional discharge as a risk? Will the operator be willing to post a "risk-based" bond for water treatment? (Note that for a federal regulatory authority to require up-front risk-based bonding from an operator a rulemaking, and perhaps legislation, would most likely be required.) Another option here may be a bond that would roll over to another site once it is determined that the site will not produce AMD. The important aspect in that situation would be the determination point of roll over to another site.

2. Would the surety/insurance/financial industry be willing to provide this type of coverage? Or create some kind of national pool or insurance? (They may be willing, since this would be similar to any other insurance, and the costs would be based on an analysis of the risk to the insurer.)

3. Would the federal/state regulatory authorities be willing to create some type of national pool or insurance? (Note: this would likely require legislation or a regulation)

4. Someone (operator, surety, regulatory authority) would need to develop criteria to determine the level of risk associated with a permit, such as whether the area proposed to be mined has a history of AMD, even though the permit application does not indicate potential for AMD.
5. Would need to clearly define what each financial instrument covers. For example, would the land reclamation bond cover correction of a defective toxic material handling plan?

6. Even with a separate financial mechanism for water treatment, there would still be the requirement to ensure that the bond amount was adequate in the event of AMD. Therefore, any separate financial mechanism would need a provision for adjustment once treatment costs are known.

7. Any separation should be done in a manner that does not open the door for industry to more easily get a permit that will likely produce long-term AMD, i.e., regulatory authorities should still not approve permits that cannot demonstrate that AMD will not occur.

8. Separating bonds would reduce the exposure concerns of the bonding industry for land reclamation since the uncertain environmental liability of AMD would be covered by a separate instrument. This presumably would make land bonds more readily available, and probably at lower costs or less collateral. Also, instruments such as escrow accounts would allow for assurance and if funding were not needed, it would be released back to the operator at the appropriate time.

9. Some operators may only be able to obtain one bond. Will the surety industry be less likely to post bonds for those operators if others are separating out the environmental liability with another financial mechanism? Would this create a disparity in coverage?

B. Separate bonds after mining occurs.

Separating the water treatment aspect of a bonding instrument after AMD has been identified will be more difficult since the bonding instrument posted at the time a permit was issued was intended to cover the entire reclamation. Therefore, if another financial mechanism were secured for water treatment, it would need to be adequate to cover the calculated amount prior to release of the initial bond.

Factors in considering separate bonds and/or release of land reclamation bonds at this stage include:

1. Would need to clearly define what each financial instrument covers.

2. Would have to agree on a methodology to calculate the amount of bond needed for water treatment and determine the length of time for treatment. More parties may be involved with a separate financial instrument.

3. Timing of separation – would need to be done as early as possible so that an appropriate financial assurance mechanism could be established and funds accumulated to adequately cover the water treatment required.

4. May not work in situations where the obligation remains with the initial bond. Would have to review the initial bond to see if the obligation can be severed.

5. Phase bonding may be appropriate to cover water treatment in this situation, if the phase III bond accounts for the potential of AMD and is adequate to cover the water treatment.

C. Separate bonds at stage of reclamation

OSM has referenced the acceptance of other types of financial mechanisms when it acknowledged that jurisdiction over a mine site with a pollutional discharge may be terminated only if such a contract exists and all other performance standards are met. OSM addressed this matter in both, the preamble to the termination of jurisdiction rule at 30 CFR 700.11(d) (53 FR, 44361-62, November 2, 1988) and in its March 31, 1997 AMD Policy Statement. OSM stated in its 1997 AMD Policy Statement:

> *...the termination of jurisdiction rule at 30 CFR 700.11(d) does not expressly allow bond release in situations in which postmining pollutional discharges exist. Furthermore, the preamble to this rule clarifies that bond release in these situations is appropriate only in the presence of "assurances which are provided through a contract or other mechanism enforceable under other provisions of law to provide, for example, long-term treatment of an alternative water supply or acid discharge." 53 FR 44361-62, November 2, 1988. In referencing a contract, the preamble clearly envisions that these assurances will result in continued treatment or implementation of other remediation measures, which translates to a financial commitment. In keeping with the preamble, the policy statement recognizes that the required financial assurance may take a form other than those associated with a traditional performance bond.*

OSM has determined in the event that postmining pollutional discharges exist, bond may only be released if there is a suitable financial assurance through a contract or other mechanism enforceable under other provisions of law that will assure continued treatment and/or abatement of the discharge. Only a financially-based legally enforceable contract or other legally enforceable mechanism can meet this standard. Other commitments such as an NPDES permit or other administrative permitting actions that do not include a clearly defined financial assurance that treatment will continue are not acceptable under OSM's current AMD policy.

Financial options may include sinking funds, trust funds, risk bonding, national or regional bond pools, and additional types of alternative bonding systems.

If an operator waits until the reclamation stage to consider a separate bonding instrument for water treatment, it will likely be too late to obtain an instrument with an accumulated amount of

funding adequate enough to allow for release of the bond previously posted. Also, the operator may be in a more difficult position to obtain financial assurance since the mine will no longer be producing coal and will not have revenue from coal production.

Another issue to address is the termination of reclamation liability (termination of jurisdiction) on all aspects of the site other than those related to the water treatment. In cases where the performance bond is the instrument used to cover water treatment, termination of jurisdiction does not occur on the entire site until the performance bond is released. A suggestion is for a bifurcated liability process in this type of situation so that the requirements of the Act would pertain only to the remaining water treatment liability. A regulation that may allow this is 800.13(b).

In summary, there does not appear to be restrictions against separating land and water reclamation bonds. The timing of when this occurs and clearly defining the obligations for each financial assurance mechanism will be instrumental in making this work. In addition, reclamation liability on a site covered by a performance bond, when the only outstanding issue is water treatment, needs further review.

Bonding Work Group
Alternative Bonding
"Thought Piece"

Examine the need for more regulatory flexibility for state bonding alternatives under OSM's current regulatory regime.

BACKGROUND

Surface Mining Control and Reclamation Act of 1977 (SMCRA):

Section 509 of SMCRA contains the requirements for performance bonds. The bond shall cover the area of land within the permit area upon which the operators will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit. As succeeding increments of surface coal mining and reclamation operations are to be initiated and conducted with the permit area, the permitted shall file with the regulatory authority an additional bond or bonds to cover such increments in accordance with this section.

The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture.

Liability under the bond shall be for the duration of the surface coal mining and reclamation operations and for a period coincident with the operator's responsibility for revegetation requirements in Section 515. The bond shall be executed by the operator and a corporate surety licensed to do business in the State where such operation is located, except that the operator may elect to deposit cash, negotiable bond for the United State Government or such State, or negotiable certificate of deposit of any bank organized or transacting business in the United States. The cash deposit or market value of such securities shall be equal to or greater than the amount of the bond required for the bonded area.

The regulatory authority may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the regulatory authority the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount or ***in lieu of establishment of a bonding program, as set forth in this section, the Secretary may approve as part of a State or Federal program an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section.***

Cash or securities so deposited shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. Such securities shall be security for the repayment of such negotiable certificate of deposit.

The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.

30 CFR 800.11 Requirement to File a Bond:

Incremental Bonding

30 CFR 800.11

(b)(1) The bond or bonds shall cover the entire permit area, or an identified increment of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations during the initial term of the permit.

(b)(2) As surface coal mining and reclamation operations on succeeding increments are initiated and conducted within the permit area, the permittee shall file with the regulatory authority an additional bond or bonds to cover such increments.

(b)(3) The operator shall identify the initial and successive areas or increments for bonding on the permit application map submitted for approval in the application (under parts 780 and 784 of the 800 chapter), and shall specify the bond amount to be provided for each area or increment.

(b)(4) Independent increments shall be of sufficient size and configuration to provide for efficient reclamation operation should reclamation by the regulatory authority become necessary.

(c) An operator shall not disturb any surface areas, succeeding increments or extend any underground shafts, tunnels or operations prior to acceptance by the regulatory authority of the required performance bond.

(d) The applicant shall file, with the approval of the regulatory authority, a bond or bonds under one of the following scheme to cover the bond amounts for the permit area as determined in accordance with 800.14:

(1) A performance bond or bond for the entire permit area;
(2) A cumulative bond schedule and the performance bond required for full reclamation of the initial area to be disturbed; or
(3) An incremental bond schedule and the performance bond required for the first increment in the schedule.

Phased Bonding

30 CFR 800.13

(a)(1) Performance bond liability shall be for the duration of the surface coal mining and reclamation operation and for a period which is coincident with the operator's period of extended responsibility for successful revegetation provided in 816.116 or 817.116 of this chapter or until achievement of the reclamation requirements of the Act, regulatory program, and permit whichever is later.

(a)(2)With the approval of the regulatory authority, a bond may be posted and approved to guarantee specific phases of reclamation within the permit area provided the sum of phase bonds posted equals or exceeds the total amount required under 800.14 and 800.15. The scope of work to be guaranteed and the liability assumed under each phase bond shall be specified in detail.

(b) Isolated and clearly defined potions of the permit area requiring extended liability may be separated from the original area and bonded separately with the approval of the regulatory authority. Such areas shall be limited in extent and not constitute a scattered, intermittent or checkerboard pattern of failure. Access to the separated areas for remedial work may be included in the area under extended liability if deemed necessary by the regulatory authority.

Alternative Bonding

30 CFR 800.11

(e) OSM may approve, as part of a State or Federal program, an alternative bonding system, if it will achieve the following objectives and purposes of the bonding program:

(e)(1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time; and

(e)(2) The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

DISCUSSION

Under 30 CFR 800.11(d), the permittee has the option of selecting which bond scheme [permit area, cumulative, incremental, and phased] he or she wishes to file. The regulatory authority has the discretion to accept or not to accept what the operator files.

Cumulative Bonding

Under the cumulative bonding option at 30 CFR 800.11 (d)(2), the permittee has to file not only a cumulative bond schedule, but also a performance bond or bonds in the amount necessary to cover reclamation of the initial area to be disturbed. Prior to successive disturbance, the permittee posts additional bond amounts in accordance with an approved reclamation-cost/land-disturbance schedule submitted at the time the initial bond is posted. Partial release of bond under a cumulative schedule is not prohibited; although, liability of a cumulative bond extends over the entire permit area. In forfeiture, bond moneys may be used anywhere within the permit area to cover the costs of reclamation.

Incremental Bonding

Incremental bonding recognizes a permit area divided into discrete land parcels, each separate from and independent of another insofar as the reclamation work and legal liability are concerned. Usually each increment is covered by a different bond instrument. In forfeiture, bond moneys that cover one increment may not be used to cover the costs of reclaiming another increment.

Phased Bonding

Phased bonding may be used with the approval of the regulatory authority. Liability under phased bonds extends to the approved permit area. Under Phased bonding, a bond may be posted to cover Phase I reclamation operations such as backfilling, re-grading, and drainage control work. Other bonds are posted simultaneously to cover Phase II and III reclamation requirements such as revegatation and the long-term liability period. The total dollar amount of the phase bonds must be sufficient to cover costs to the regulatory authority to complete the reclamation plan. Bonds covering all three phases must be posted prior to any disturbance of the approved permit area. The advantage to phased bonding is that a surety's legal liability is limited to the "scope" of the reclamation work being covered, i.e. Phase I bonds cover Phase I reclamation operations that are defined on the bond and/or identified in the approved reclamation plan.

Alternative Bonding

State and Federal programs may adopt alternative bonding systems if they are approved by OSM and meet certain objectives. These objectives include assuring that sufficient money will be available to the regulatory authority to complete the reclamation if a default should occur. The alternative bond must also provide substantial economic incentives for the permittee to comply with all reclamation provisions.

It is interesting that this item is not under "Form of Bonds," at 30 CFR 800.12, but under "Requirement to File a Bond" which allows different bond procedures or schemes as well as bond forms.

RECOMMENDATIONS

The current OSM bonding regulations do have flexibility for approved alternative bonding systems. Additionally, cumulative, incremental, and phased bonding schemes also contain flexibility that may be considered by permittees. The existing flexibility in the federal regulations is thought to be sufficient to provide regulatory authorities and permittees with many bonding options. If the options were utilized, financial and legal liability for reclamation performance could be divided and limited to the extent allowed under the various options.

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When Should AMD Bonding Be Required?

Section 510(b)(3) of SMCRA requires that no permit application shall be approved unless the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Section 515(b)(10) of SMCRA seems to anticipate that acid mine drainage (AMD) could occur during and after mining. This section states that the operation shall minimize the disturbances to the prevailing hydrologic balance at the mine-site and associated offsite areas and to the quality and quantity of water in surface and ground water systems both during mining and after surface coal mining operations and during reclamation... The section also contains a list of measures that can be utilized to minimize or prevent AMD from occurring.

Even utilizing the best technology available to design and evaluate the geologic and hydrologic aspects of an application, prediction of the occurrence of AMD is not infallible. Permits still have a possibility of creating AMD discharges during and after mining.

When AMD does occur on a mining operation, there exists a need to determine whether additional financial assurance is necessary to eliminate or treat the AMD in the event of forfeiture. All AMD discharges that occur do not cause material damage to the hydrologic balance outside the permit area. Therefore, in order to determine whether or not the AMD discharge is creating material damage to the hydrologic balance and additional financial assurance is necessary there must be a clear understanding of the regulatory requirements and it would be desirable if a method were in place to assess the effects of the AMD on the hydrologic balance.

The assessment of the AMD discharge should be based on whether the AMD discharge is causing material damage to the hydrologic balance to the surface and ground water systems outside the permit area. The cover letter for the 1997 OSM AMD Policy Statement indicates that additional input and agreement from all interested parties is necessary for the development of a better understanding of thresholds and guidelines for assessing material damage. It would seem therefore, essential that the term "material damage" be given some meaning either through a regulatory definition or through a set of guidelines to be utilized in making a determination to require additional financial assurance.

The examples below are of some scenarios that most, if not all, regulatory states in the Appalachian Region have had to deal with. The examples are intended to portray situations that are in a "gray area" of regulatory interpretation without obvious answers. Some states may have developed their own methods, state program requirements, and/or policies of addressing each of the situations listed below. However, without a concise interpretation of the federal program requirements, there is a risk that OSM personnel responsible for state program oversight could view the federal program requirements differently.

Situation #1:

A Title V surface mining operation has been mined and reclaimed. All aspects of the permit are in compliance. The revegetation meets all requirements and is eligible for final bond release at the end of the five-year holding period. Upon a final inspection, it is noticed that a

small seep of about 3 – 4 gallons per minute has developed on the backfilled area about 200 yards inside the permit boundary. A sample analysis reveals it has a pH of 5.7 and total iron of 7.0 mg/l. The seep flows downhill to a relatively flat area, within the permit area, and disappears. It is obviously soaking into the soils on the flat area. The seep does not leave the permit area. The presents of the seep does not affect the post-mining land use. The seep is monitored for an additional 12 months with no change under normal precipitation. Should AMD bonding be required or should the bond be released?

Situation #2:

Same scenario, but the seep leaves the permit area. The distance to the nearest receiving stream directly downhill from where the seep leaves the permit boundary is about 500 yards. The seep is traced for about 200 yards and disappears in the leaf litter and is apparently soaking into the soils. You can find no trace of the seep ever making it to the receiving stream. The seep is monitored an additional 12 months with no change under normal precipitation. Should AMD bonding be required or should the bond be released?

Situation #3:

Same scenario, but the seep reaches the receiving stream. The low flow of the receiving stream is about 1000 gallons per minute and is of good quality with a natural net alkalinity of about 20 mg/l. The inspector has sampled above the confluence of the seep and about 50 yards below the seep and lab results indicate no difference in water quality below the confluence of the seep. This situation is monitored for an additional 12 months with no change under normal precipitation. Should AMD bonding be required or should the bond be released?

Situation #4:

A small noncompliance seep appears on the backfill that flows into a permanent pond that will remain, at the landowner's request, after the permit is released. The seep has a net alkalinity but the total iron is out of compliance. The pond discharge is well within compliance limits and has been for 10 years after mine reclamation. Should AMD bonding be required or should the bond be released.

Situation #5:

An active permitted surface mining operation has a discharge that requires treatment for compliance. The same coal seam has been extensively surface mined within the same coal basin and upon backfilling has not resulted in any known noncompliance seeps. The permit application for this site contains an overburden analysis that generally indicates that there should not be any post mining water quality problems. An overburden handling plan is not required. The performance bond is adequate to complete the reclamation in the event of a permit revocation and bond forfeiture. Should AMD bonding be required on this operation?

SMCRA STATE ALTERNATE BONDING SYSTEMS

STATE	PARTICIPATION	CONVENTIONAL BOND $/ACRE	SUPPLEMENTAL FUNDS VIA TAX	SUPPLEMENTAL FUNDS VIA FEES	POOL CAPS/ LIMITS	OTHER FEATURES
Indiana	Optional. Commencement of participation constitutes an irrevocable commitment to participate for the duration of Phase II and III reclamation.	Separate bond adequate to assure Phase I reclamation (state can require adjustments if necessary)	None	$1000 one-time entrance fee $25 one time fee per bonded acre covered by pool Annual $10/acre after Phase I release After Phase II release, $5/acre per year for first 3 years, subsequently $10/acre until final bond release is approved	None	Conventional bond is released at conclusion of Phase I (when backfilling, grading and drainage control is completed)

STATE	PARTICIPATION	CONVENTIONAL BOND $/ACRE	SUPPLEMENTAL FUNDS VIA TAX	SUPPLEMENTAL FUNDS VIA FEES	POOL CAPS/ LIMITS	OTHER FEATURES
Kentucky	Optional. Participation is limited to qualified members. Qualification is on a rating system (A,B, C) based on mining experience, reclamation record, bond release history and financial standing.	Based on rating – range is $500 - $2000	Tonnage fee of 5 cents for surface mining and one cent for underground mining When the fund reaches $7 million, members who have made 36 or more monthly payments no longer have to pay the tonnage fee unless the fund decreases to $5 million	Membership fee based on permittee's rating – range is $1,000 to 2,500.	Pool's liability for a site is determined by subtracting the permit specific performance bond from the total required bond amount calculated through conventional bonding methods.	The permit-specific bond is completely released at phase I. After Phase I bond release, the bond pool is responsible for the full bond liability until final bond release. Maximum bond amounts which may be released are 60 percent at Phase I, an addition 25% at phase II and rest at phase III Adjustment of performance bond liability to the same for the ABS and conventional bonding, except that increases in the bond amount under the ABS is added to the bond pool's liability not the permit-specific bond posted by the permittee.

STATE	PARTICIPATION	CONVENTIONAL BOND $/ACRE	SUPPLEMENTAL FUNDS VIA TAX	SUPPLEMENTAL FUNDS VIA FEES	POOL CAPS/ LIMITS	OTHER FEATURES
Maryland	Mandatory	Support areas are bonded at $1500 per acre, the first 40 acres of mining area at $3,000 per acre and all additional acreage at $3,500/acre	$.15/per ton whenever reserve fund falls below $200,000 until fund reaches $300,000 – then $.09/per ton	On-time $200 fee with an annual renewal of $10 $75 per acre	State has adopted a policy that will limit the liability of the pool by increasing the permittee's individual bond amount where unanticipated AMD develops	Bond is released as reclamation phases are accomplished on each incremental area, although liability remains through Phase III
Missouri	Mandatory	Phase I bonds: $2,500/acre $10,000 per acre for coal prep areas	$.30 for the first 50,000 tons and $.20 for the second 50,000 tons of coal sold by each permittee from Missouri operations in a calendar year	None	None.	An area qualifies for Phase 1 liability release upon completion of backfilling etc but the Phase I bond is only reduced by 80 percent. The remaining bond is released when Phase III liability is released.
Ohio	Mandatory	$2,500/acre with a $10,000 minimum (may be deposited and released incrementally)	$.09/ton (surface and underground)	None	None	Bond amounts are released as reclamation phases are accomplished (60 percent at Phase I, an addition 25% at phase II and rest at phase III) Liability remains through Phase III

STATE	PARTICIPATION	CONVENTIONAL BOND $/ACRE	SUPPLEMENTAL FUNDS VIA TAX	SUPPLEMENTAL FUNDS VIA FEES	POOL CAPS/ LIMITS	OTHER FEATURES
Pennsylvania	Mandatory but **NO NEW OPERATIONS ALLOWED TO PARTICIPATE**	$,3000+/acre with a $10,000 minimum Support activities – additional $1000/acre	None	$100/acre	None	Bond amounts are released as reclamation phases are accomplished (60 percent at Phase I, additional amounts determined at phases II and III.)
Virginia	Optional (but irrevocable once you voluntarily enter the ABS)	UG: $3,000/acre ($40,000 minimum) Surface: $3,000/acre ($100,000 minimum)	UG: $0.03 per ton Surface: $0.04 per ton Assessments apply only when fund falls below $1.75 million. No assessment on operators after 5 million clean tons.	$1,000 per permit entrance fee ($5,000 if Fund is below $1.75 million) $1,000 permit renewal fee	Fund has a soft cap of $2 million–e.g. assessments cease and entrance fees drop once the Fund exceeds $2 million.	Bond release is standard. May request incremental bond release one year after land is reclaimed and revegetated.

STATE	PARTICIPATION	CONVENTIONAL BOND $/ACRE	SUPPLEMENTAL FUNDS VIA TAX	SUPPLEMENTAL FUNDS VIA FEES	POOL CAPS/ LIMITS	OTHER FEATURES
West Virginia	Mandatory	$1,000-$5,000	$0.14 per ton (may decrease to $0.07 per ton in four years)	No per se fees, but: (1) Penal bonds allow State to keep entire bond amount even if cost of reclamation are less (2) Permittee or operator remains liable for all costs after forfeit if insufficient funds (3) Interest accrues on fund assets to provide supplemental funds	None (OSM forced State to remove 25% cap on fund for water treatment; now its unlimited)	State is required to reclaim according to the permit, including water treatment Phase I released only if remaining bond is sufficient for water treatment. Phase II and III bonds may not be released if water requires treatment, regardless of how much funding is available.

Acceptable Forms of Bonds/Financial Assurance							
Regulatory Agency	Surety Bond	Collateral Bond	Self Bonding	Combination of mechanisms	Incremental Bonding	Phased Bond	Alternative Bonding System
OSM 30 CFR 800	Yes.	Yes. Cash accounts, certificates of deposit, negotiable bonds, letters of credit, real property, investment grade securities having a rating of A or higher.	Yes. If the applicant: 1) has been in continuous operation as a business entity for 5 years; 2) meets one of these criteria: i)bond rating =A or higher; ii)tangible net worth > $10 million, liabilities/net worth ratio < 2.5, a assets/liabilities ratio > 1.2 iii) fixed assets in the US total at least $20 million, and same ratio tests in ii) are met 3)the total amount of the outstanding and proposed self-bonds of the applicant shall not exceed 25 percent of the applicant's tangible net worth in the US.	Yes. Any combination of surety, collateral and self-bonding permitted	Yes. 800.11(b) Allows the bond or bonds to cover an identified increment of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations during the initial term of the permit and then to file an additional bond or bonds to cover additional increments as operations continue.	800.13(a)(2) authorizes the RA to approve bonds posted to guarantee specific phases of reclamation within the permit area, provided the sum of phased bonds equals or exceeds the total amount required.	800.11(e) OSM may approve, as part of a State or Federal program, an alternative bonding system, if it will assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time; and (2) The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.
Alabama	Yes.	Yes. Cash; CDs limited to FDIC max.; letters of credit.	Yes. Same requirements as OSM.	Yes.	Yes.	No.	No.

Acceptable Forms of Bonds/Financial Assurance							
Regulatory Agency	Surety Bond	Collateral Bond	Self Bonding	Combination of mechanisms	Incremental Bonding	Phased Bond	Alternative Bonding System
Colorado	Yes.	Yes. Cash, negotiable government bonds, negotiable certificates of deposit, letters of credit, real property	Yes. Same requirements as OSM.	Yes. any combination of surety, collateral, and self-bonding	Yes.	Yes see CO Rule 30.2.1.(5)(b)	No current system established but allowed through rulemaking – Division will approve if basically provides same safeguards
Illinois	Yes.	Yes. Cash; CDs; govt. securities; letter of credit; or any combination of the above	Yes. Same requirements as OSM.	No.	Yes.	No.	No.
Indiana	Yes.	Yes. cash; CDs up to $100,000; irrevocable letters of credit. Escrow account	Yes. Same requirements as OSM.	Yes. any combination of surety, collateral, and/or escrow is allowed.	Yes.	Yes, same as OSM (see 310 IAC 12-4-7(a)).	Yes. Optional but irrevocable once you voluntarily enter.
Kentucky	Yes.	Yes. Cash, CDs, letters of credit	No.	Yes. Surety and Collateral Bond combo allowed	Yes.	No.	Yes. Optional participation.

Acceptable Forms of Bonds/Financial Assurance							
Regulatory Agency	Surety Bond	Collateral Bond	Self Bonding	Combination of mechanisms	Incremental Bonding	Phased Bond	Alternative Bonding System
Maryland	Yes	Yes–cash, neg. bonds (US), neg. CDs, irrevocable letter of credit	No.	No.	Yes	No.	Yes–Mandatory.
Missouri	Yes.	Yes. Certificates of deposit and letters of credit	Yes. Same requirements as OSM.	No.	Yes.	Yes.	Yes. Mandatory participation.
Montana	Yes.	Yes. Cash, negotiable bonds, negotiable certificates of deposit and letters of credit	No.	No.	Yes.	No.	No.
New Mexico	Yes.	Yes. including letters of credit, real property, cash	Yes but excludes certain assets from value of fixed assets.	Yes.	Yes.	Yes, same as OSM (see NMAC 19.8.14.1403).	No.

Acceptable Forms of Bonds/Financial Assurance							
Regulatory Agency	Surety Bond	Collateral Bond	Self Bonding	Combination of mechanisms	Incremental Bonding	Phased Bond	Alternative Bonding System
North Dakota	Yes.	Yes. Cash; CDs of ND banks (up to $100,000); neg. bonds of US or ND.	Yes. Same requirements as OSM.	Yes. any combination of surety, collateral, and self-bonding is permissible.	Yes.	No.	No.
Ohio	Yes.	Yes.	Yes. Same requirements as OSM.	Yes.	Yes. – at election of permittee, based on number of acres to be affected in upcoming year	No.	Yes. Mandatory participation.

Acceptable Forms of Bonds/Financial Assurance							
Regulatory Agency	Surety Bond	Collateral Bond	Self Bonding	Combination of mechanisms	Incremental Bonding	Phased Bond	Alternative Bonding System
Pennsylvania	Yes.	Yes. Negotiable government securities, certificates of deposit, letters of credit, life insurance policy, annuity or trust fund.	Yes, except for long-term indeterminate liabilities. Must demonstrate 1) a history of continuous efforts to achieve compliance with Federal and State environmental laws; 2) that during previous 36 months, not defaulted on payments; 3) that have honored obligations under other self-bonding programs established by another state or the Federal government; 4) that has not had commercial surety bonds cancelled for nonpayment of premiums or fraud or failure to comply with conditions; 4) that meet one of three financial tests: **Test 1**: i) bond rating =A or higher; ii) Tangible net worth at > or = to 6 times the total amount of outstanding and proposed self-bonds for coal mining activities in PA; or iii) Assets in the United States amounting to at least 90% of total assets; **Test 2:** i) tangible net worth >$10million; ii) liabilities/ net worth ratio < 2.5, a assets/ liabilities ratio > 1.2; iii)Tangible net worth > or = to 6 times the total amount of outstanding and proposed self-bonds; iv)US assets =90% total assets. **Test 3:** i) possesses fixed assets in the US of at least $20 million ; ii) liabilities/ net worth ratio < 2.5, a assets/ liabilities ratio > 1.2; iii)Tangible net worth > or = to 6 times the total amount of outstanding and proposed self-bonds; iv)US assets =90% total assets. Allows security interests for self bonding to be reduced if tangible net worth is high enough.	Yes.	Yes. Allowed for long-term mines, long-term facilities and coal refuse disposal activities (basically 25%of total amount paid upfront, then 10%/year of remaining amount for next 10 years)	No.	Formerly available.

Acceptable Forms of Bonds/Financial Assurance							
Regulatory Agency	Surety Bond	Collateral Bond	Self Bonding	Combination of mechanisms	Incremental Bonding	Phased Bond	Alternative Bonding System
Texas	Yes.	Yes. Cash; CDs; US/State/ Municipal bonds; letters of credit; perfected 1st lien in real or personal property; securities with A or better rating.	Yes–same as OSM plus allowed if: Bond=Baa3 and: (A)(1) NW>10 mil. + assets > 20 mil. (2) L/NW < 2.5 or < industry average (3) CA/CL > industry average or credit rating is 4A2 or higher; or (B)(1) NW > 100 mil. + fixed assets > 200 mil. (2) subject to 1933/1934 Securities Act (3) Self bonds < 16.67% of applicant NW	Yes. Surety and Escrow may be combined	Yes.	No.	No.
Utah	Yes.	Yes. Cash; neg. U.S. bonds; neg. CDs.	Yes. Same requirements as OSM.	No.	Yes.	Yes, same as OSM (see R645-301-820-320).	No.
Virginia	Yes.	Yes. Certificates of deposit, cash. Escrow accounts permitted under 4 VAC 25-130-800.23	Yes. Allowed if applicant has a certified net worth of no less that $1 million after total liabilities are subtracted from total assets. Must also show evidence of satisfactory continuous operation.	Yes.	Yes.	No.	Yes. Optional but irrevocable once you voluntarily enter.

Acceptable Forms of Bonds/Financial Assurance							
Regulatory Agency	Surety Bond	Collateral Bond	Self Bonding	Combination of mechanisms	Incremental Bonding	Phased Bond	Alternative Bonding System
West Virginia	Yes.	Yes. Government bonds, certificates of deposit, cash, real property, whole life insurance, letters of credit Escrow accounts permitted under 38-2-11.3.e.2.B	Yes. Same requirements as OSM.	Yes. Escrow and surety may be combined.	Yes.	No.	Yes. Mandatory participation.
Wyoming	Yes.	N/A (but see collateral under Self Bonding)	Same as OSM, but under ii) and iii) self bond amount added to CL, but may deduct reclamation costs accrued. Additional tests needed if personal property used to self bond. Collateral may be used to support self bond, including: real or personal property and government securities.	No.	Yes.	Yes-"Area" bond covers backfilling. "Incremental bond" covers all other reclamation requirements for entire duration of operation + 10 year revegetation.	No.

PROPOSALS FOR CHANGES TO OFFICE OF SURFACE MINING AND STATE BONDING RULES AND SUGGESTIONS FOR FURTHER STUDY AND EVALUATION OF POLICIES

	PROPOSAL	CURRENT RULE	COMMENT
I.	**SELF BONDING QUALIFICATION CRITERIA**		
1.	Credit Rating Test: Change criteria companies that have an investment grade rating by a nationally recognized securities rating service(e.g., Standard and Poor's BBB-; Moody's Baa3; NAIC-2 or above) for either its most recent bond issuance or its unsecured credit rating.	30 C.F.R. § 800.23(b)(3) (i) Current bond rating of "A" or higher for its most recent bond issuance.	Several changes are requested: First, the criteria be set at an investment grade rating (e.g. BBB- or above); Second, the acceptable rating services include any nationally recognized service, not only Standard and Poor's and Moody's; and, Third, the rating criteria can be satisfied by either a bond issuance rating or an unsecured credit rating. Standard and Poor's ratings of BBB-(or equivalent rating from nationally recognized rating services) and above are considered investment grade. Securities with this investment grade are eligible for bank investment under commercial banking regulations. The ratings should extend to unsecured credit ratings for companies so firms with equal or better creditworthiness that have not issued bonds may use this form of bonding. Finally, some firms use private placement debt to finance operations. These placements are rated by the National Association of Insurance Companies (NAIC) Securities Valuation Office.

	PROPOSAL	CURRENT RULE	COMMENT
2.	Tangible Net Worth and Fixed Asset Thresholds with Ratio Tests: Eliminate ratio tests allow companies that meet either the Fixed Asset or the Tangible Net Worth thresholds to self-bond up to 50% of their net worth.	30 C.F.R. § 800.23(b)(3) (ii) Tangible net worth $10 million, ratio of total liabilities to net worth of 2.5 times or less, and ratio of current assets to current liabilities 1.2 times or greater (iii) Fixed assets total at least $20 million, and ratio of total liabilities to net worth of 2.5 times, and ratio of current assets to current liabilities 1.2 times or greater.	The current ratio tests are an outmoded measure of financial strength and creditworthiness. In particular, the current ratio test focuses upon short term liquidity where the obligation being assured is long term and better evaluated in the context of overall corporate financial strength rather than working capital. The current test penalizes sound balance sheet management where companies reduce their receivables, stretch-out payables, and use excess cash to either pay down debt or put back in operations. In short, the current test requires companies to engage in the unproductive practice of keeping idle cash on hand in order to meet the criteria. The financial strength of the company as a test for measuring their ability to meet their long term reclamation obligations should focus upon the company's net worth. By requiring a company to have a net worth twice the amount of its self bond amounts, the rule would place a self bonding cap of 50% of the company's net worth. The current rules at § 800.23(b)(4) contain requirements that assure that the regulatory authority will have the proper financial statements and reports that demonstrate that the applicant meets this criteria. 30 C.F.R. § 800.23(b)(13)(ii) The applicant has a tangible net worth of at least $10 million, and the applicant has a net worth of 2.0 times the proposed amount of the self bond ~~a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater~~. 30 C.F.R. § 800.23(b)(3)(iii) The applicant's fixed assets ~~in the United States~~ total at least $20 million, and the applicant has a net worth of 2.0 ~~2.5~~ times ~~or less~~ the proposed amount of the self bond ~~and a ratio of current assets to current liabilities of 1.2 times or greater.~~

	PROPOSAL	CURRENT RULE	COMMENT
3.	Increase limit on self-bonding to 50% of tangible net worth. Remove restrictions on using non-domestic assets as part of the net worth subject to the limits on self bonding.	30 C.F.R. § 800.23(d) Total amount of self bonds for surface mining and reclamation operations cannot exceed 25% of applicant's tangible net worth in U.S.	As indicated in the earlier comment regarding the ratio tests, the limit, or cap, on self bonding should be established at 50% of net worth. Raising the limit to 50% will allow companies to more readily rely upon self bonding without unduly raising the risk to the states or federal government. For purposes of this self bonding limit, the rules should allow companies to rely upon their non-domestic assets in measuring net worth. The current exclusion fails to recognize the increasingly global economy and the importance of foreign direct investment to the mining industry and domestic economy. 30 C.F.R. § 800.23(d): For the regulatory authority to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations shall not exceed ~~25~~ 50 percent of the applicant's tangible net worth ~~in the United States~~. For the regulatory authority to accept a corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation operations shall not exceed ~~25~~ 50 percent of the guarantor's tangible net worth ~~in the United States~~. For the regulatory authority to accept a non-parent corporate guarantee, the total amount of the non-parent corporate guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed ~~25~~ 50 percent of the guarantor's tangible net worth ~~in the United States~~.

	PROPOSAL	CURRENT RULE	COMMENT
4.	Definition Fixed Assets: Include coal reserves and undeveloped land	30 C.F.R. § 800.23(a) Fixed assets means plants and equipment, but does not include land or coal in place	The agency's prior reasoning for excluding undeveloped land or coal reserves within the definition was that undeveloped land valuations are subject to great variation, and coal reserves are not easily liquidated. This reasoning is simply incorrect. Valuation methodologies and procedures are well-developed and even the Department of the Interior has a procedures it uses frequently for land exchanges. Contrary to the view expressed two decades ago by the agency, coal reserves are not difficult to liquidate and the robust market place in the sale of reserves adequately demonstrates this to be the case.

	PROPOSAL	CURRENT RULE	COMMENT
5.	Five-year continuous operation requirement met if the permittee's parent meets criteria	30 C.F.R. § 800.23(b)(2) Applicant has been in continuous operation as a business entity for a period of not less than 5 years	OSM declined to adopt a similar provision when it revised the bonding rules in 1983. OSM's reasoning was that it was unnecessary since a parent company could become the corporate guarantor. However, it appears that OSM missed the point in that such a revision would allow the subsidiary that meets the other financial strength criteria to self bond without a parent guaranty when it has not been in business itself for five years. New subsidiaries are established for new or acquired operations and they can have the financial strength to meet the self bonding criteria. What they do not have is the length of time in business since they were recently created. Some parent corporations prefer not to submit to the corporate guarantee requirements to self bond their subsidiary especially if their subsidiary can meet the financial strength tests independently. Relying upon, or attributing, the parent's time in operation as a business entity to a subsidiary who independently meets the financial strength tests will not pose any greater risk to the regulatory authority . 30 C.F.R. § 800.23(b)(2) The applicant or its parent has been in continuous operation as a business entity for a period of not less than 5 years. Continuous operation shall mean that business was conducted over a period of 5 years immediately preceding the time of application.

	PROPOSAL	CURRENT RULE	COMMENT
6.	One member of joint venture must meet 5-year continuous operation criteria	30 C.F.R. § 800.23(b)(2)(i) All members of joint venture must meet 5-year continuous operation criteria	The reasons set forth above for attributing the parent's length of time in business to the subsidiary also applies here for this suggestion where only a single member of a joint venture, rather than all of the venture must be in operation for five years. The current rule unduly penalizes firms that have been in the coal business but partner with venture capital firms or others who will supply capital to acquire or begin new mining ventures. 30 C.F.R. § 800.23(b)(2)(i) (i) The authorized officer may allow a joint venture, limited liability company or syndicate with less than 5 years of continuous operation to qualify under this requirement, if one ~~each~~ member of the joint venture, limited liability company or syndicate has been in continuous operation for at least 5 years immediately preceding the time of application.

	PROPOSAL	CURRENT RULE	COMMENT
II.	**OTHER FORMS**		
1.	Additional Forms: Allow additional forms of bonds not specifically listed by rule	30 C.F.R. § 800.12 Bond forms limited to (a) surety bond; (b) collateral bond; (c) self-bond; (d) a combination any of these bonding methods.	Regulatory authorities should be able to accept new or alternative forms of financial assurance that are not specifically mentioned in the federal or state rules. When certain forms of assurance, such as surety or letters of credit, become difficult or impossible to obtain at reasonable or any rates, new products or approached may emerge to address these circumstances. If the federal and/or state agency must conduct a rulemaking before any new or different forms of bonding are acceptable, companies may suffer severe financial consequences due to the inability to continue or begin operations. There are new products emerging (e.g., finite risk insurance) that some firms might need to resort to where surety capacity is simply unavailable. But it would not appear that this product would be acceptable since insurance is not listed. In turn, the company would have to expend additional sum to acquire a wrap-around surety bond that is secured by the insurance. In short, the company would be expending additional capital simply to fit a new product within an existing regulatory framework. 30 C.F.R. § 800.12 The regulatory authority shall prescribe the form of the performance bond. The regulatory authority may allow for: (a) a surety bond; (b) a collateral bond; (c) a self-bond; (d) a combination of any of these bonding methods; or (e) an alternative method of financial assurance that provides for a comparable level of assurance for performance of reclamation obligations.

	PROPOSAL	CURRENT RULE	COMMENT
2.	Collateral Bonds: May be secured by investment- grade rated securities having a rating of BBB- or above	30 C.F.R. § 800.05(b)(6) Collateral bond may be secured by investment-grade rated securities having a rating of AAA, AA or A	BBB- (or equivalent rating from a nationally recognized rating service) securities are considered investment grade, and under commercial banking regulations are eligible for bank investment.
3.	Collateral Bonds: May be secured by personal property	30 C.F.R. § 800.05(b) Personal property not accepted as collateral	Provides additional form of collateral as long as the operator demonstrates that personal property is adequate collateral and is unencumbered, i.e., by requiring the operator to conduct a UCC search, as follows: 30 C.F.R. § 800.5(b)(7) (7) a perfected, first-lien security interest in personal property, secured by a financing statement or fixture filing or other means in accordance with state law and confirmed by a search of filings under the Uniform Commercial Code documenting a perfected first-lien security interest.

	PROPOSAL	CURRENT RULE	COMMENT
4.	Bond Pools: Allow bond pools to establish limits on their aggregate exposure at a single site.	No rule	As a matter of policy, OSM should approve bond pools that place a limit upon the pool's aggregate exposure at a single site, or limit their exposure to specific phases of the reclamation. For pools that limit their aggregate exposure at a single site, such pools should be accepted if they have a mechanism in place to: (1) initially establish the bond amount for the proposed operation; (2) allocate that amount between the pool and the supplemental bond posted by the permit applicant; and, (3) adjust the bond amount when necessary and reallocates the new amount between the pool and permittee's other bond. Exposure limits are sound risk management techniques, and implemented in a manner similar to that set forth above, such a pool would be as effective as a conventional bond. Bond pools that cover specific phases (e.g., Phase II and/or III) of the reclamation obligation would be an acceptable alternative system and consistent with the federal rules authorization for phased bonding. Several state bond pools are designed in this manner and this type of pool will be integral to preserving surety capacity for coal mines in view of the sureties' expressed reluctance to underwrite long term obligations.
III. BOND RELEASE AND BOND REDUCTIONS			
1.	Bond Reduction: Clarify that cost reductions qualify for bond reduction	30 C.F.R. § 800.15(c) Allows a permittee to request bond reduction by submitting evidence that method of operation or other circumstances reduce costs to regulatory authority	Current rules recognize that bonds may be reduced when the operator can demonstrate that circumstances reduce costs of the reclamation operation. No regulation change appears necessary, but it may be useful for states to explore with the industry the type of circumstances that would reduce reclamation costs which would be eligible for bond reductions.

	PROPOSAL	CURRENT RULE	COMMENT
2.	Bond Release 1. Success Standards: Need to be simplified	30 C.F.R. § 800.40(2) At completion of Phase II, regulatory authority may release a portion of the bond after successful revegetation has been established; no contribution of suspended solids to stream flow; soil productivity is returned to prime farm lands. 30 C.F.R.§ 800.40(3) At completion of Phase III, full bond release after revegetation success period has run and reclamation requirements fully met. 30 C.F.R. § 816.116 Revegetation Success Standards -- Surface Mining Operations 30 C.F.R. § 817.116 Revegetation Success Standards -- Underground Mining Operations	Sureties have identified the complex and prolonged process for obtaining bond release as one factor in their eschewing the underwriting of mine reclamation bonds. Operators have identified the complexity of the success standards as deterring the timely application for release notwithstanding that reclaimed areas have been restored to a condition that supports the designated post-mining land use. It is in no one's interest to tie-up bond capacity on areas that have been adequately reclaimed. The OSM, States and industry should begin examining the current success standards and the means for measuring success in order to determine whether they are overly complex and whether other techniques or methods can be adopted to judge successful reclamation for purposes of bond release.

	PROPOSAL	CURRENT RULE	COMMENT
3.	Phase II and III Release: States should examine their programs to ascertain whether their rules require the retention of artificially high bond amounts after Phase I release.	30 C.F.R. § 800.49(c)(2)(3): No specific regulatory limitation on percent of bond release for Phases II or III.	Statutory limitations at SMCRA § 519(c)(1) allows release of 60% of the bond for Phase I obligations. At phase II , the remaining portion of the bond can be released except for that amount that it would cost to reestablish vegetation. The 1979 OSM rules restricted to 25% the amount of the remaining bond that could be released at Phase II, and required 15% to be retained regardless of the cost associated with reestablishment of vegetation if the initial revegetation failed. OSM removed these artificial constraints in a 1983 rulemaking. However, some states that had their programs approved under the 1979 rules may have not revised their release standards.
4.	Topsoil: States should examine their programs to ascertain whether they preclude top soil replacement as a condition of Phase I release.	30 C.F.R. § 800.40(c)(1): Completion of Phase I may exclude replacement of topsoil.	The 1979 rules required topsoil replacement as a condition for Phase I bond release. In 1983 this categorical requirement was removed. Top soil replacement is seasonal, and delaying release for Phase I obligations unnecessarily ties up the permittee's credit and bonding capacity. Some states that had their programs approved under the 1979 rules may have not revised their programs to allow the flexibility afforded under OSM's 1983 rulemaking.
5.	Percentage Limitation for Phase I: Study whether 60% limit on release for Phase I remains necessary.	SMCRA § 519(c)(1); 30 U.S.C. § 1269(c)(1): Imposes 60% cap on Phase I bond release	The costs and attendant bond amount associated with Phase I obligations greatly exceed the 60% limit on the amount allowed to be released after completion of this reclamation phase. As a consequence, the operator's capital is being stranded, and limited surety capacity is being unduly tied-up. OSM should evaluate the current cost structure associated with contemporary coal mining and reclamation obligations and consider whether these statutory provisions should be revised.

	PROPOSAL	CURRENT RULE	COMMENT
6.	Extended Responsibility Period: Study the continued necessity for the 5 and 10 year extended responsibility periods	SMCRA § 509; 30 U.S.C. § 1259; SMCRA § 515(b)(20)(A); 30 U.S.C. § 1265(b)(20)(A): Assume responsibility for successful revegetation for five years after establishment of vegetation for areas that receive grater than 26 inches of annual average precipitation; and 10 years for areas that receive 26 inches or less of average annual precipitation.	The extended responsibility periods in SMCRA have been identified as a major cause for the surety industry's reluctance to underwrite reclamation bonds. It also impairs companies' capital positions when they use alternatives to surety such as letters of credit or collateral. See Mine *Reclamation and Bonding*, Oversight Hearing Before the Subcommittee on Mining and Natural Resources of the House Committee on Interior and Insular Affairs, No. 101-18 (March 7, 1989). There should be adequate data to evaluate both probability and reasons for forfeiture after Phase II release. If the data shows that forfeiture due to vegetation failure after Phase II is infrequent, as well as the typical reasons where such failure has occurred, the agency, Congress and industry would be in a position to evaluate the continued efficacy of a extended responsibility period. It should be noted as well that the extended responsibility period for remining operations was modified to two-years in the Energy Policy Act of 1992, § 2503(b), P. Law 102-486, 106 Stat. 3102 (1992). If a modified two-year period has proven adequate for remining of previously mined and abandoned areas, a similar or even shorter period might be more than adequate for mining undisturbed lands.

	PROPOSAL	CURRENT RULE	COMMENT
IV.	**BOND AMOUNTS**		
1.	Contingencies: Restrict to quantifiable performance obligations	30 C.F.R. § 800.14: Bond amount criteria contains no maximum restrictions.	Evaluate current methodologies and policies for calculating amount of the bond and the adherence to quantifiable performance obligations and limiting unnecessary and excessive overhead costs in those calculations. Concerns include attempts to include bond calculations unforeseen or unplanned events as well as use of miscellaneous contingency items that can substantially inflate bond amounts artificially.

	PROPOSAL	CURRENT RULE	COMMENT
V.	**FORMS: TERMS AND CONDITIONS**		Policy exclusions are a form of risk management so that the guarantor is not exposed to certain kinds of risks. Exclusions can take several forms: (1) identification of events or costs that are not intended to be part of the assurance required under the regulatory program (2) identification of risks or costs that are part of the assurance requirements of the program, but not covered by the specific form of assurance or bond (e.g., surety, letter of credit). In the latter case where a particular obligation or cost to be excluded is a requirement of the bonding requirements of the program, another form of bond or assurance would be presented to cover that obligation. In one sense, phase bonding represents a form of exclusion since it is posted for a specific phase of reclamation and cannot be forfeited or collected for failure to perform another phase of obligations. However, the boiler plate bond forms combined with the changing requirements of the program and/or market place have contributed to the surety industry's view that there is little opportunity to manage their risk when underwriting reclamation obligations. The agency, coal industry and surety industry should explore whether current bond forms can be revised to allow the negotiation of mutually agreeable exclusions from coverage that are designed to provide the surety with greater certainty in terms of the obligations that are being underwritten and to minimize future disputes over what obligations fall within the terms of the bond. In those cases where the exclusion desired involves an obligation that is intended to be covered by the regulatory program, such exclusion would be effective if there was another form of bond or assurance for that obligation.
1.	Exclusions: Bond Forms should be allowed to provide for specific exclusions that would be covered by other forms of bond or assurance.	None	

	PROPOSAL	CURRENT RULE	COMMENT
VI. REGULATORY POLICY			
1.	Retroactive Rulemaking and Policy: Clarify that existing bonds are not subject to new or changed reclamation requirements	None	The sureties maintain that a substantial impediment to their underwriting of reclamation bonds is the changing requirements (either new requirements or material changes in the interpretation of existing requirements) of the regulatory programs. These changes accompanied by regulators assumptions that bonds already posted cover these new or changed requirements causes grave uncertainty and increased risk—in essence obligations that did not agree to underwrite. The retroactive application of new requirements is generally prohibited. Bond agreements typically include a set of performance criteria that when satisfied result in the release of the bond. When that set of "criteria" is changed by new rules or changes in interpretation of the rules in effect at the time the bond was written, the regulator is in effect attempting to use the bond to cover matters that were not part of the original agreement. The regulators failure to adhere to the general proscription against applying new or changed requirements retroactively accounts for a significant retrenchment in the surety capacity. Sureties are unwilling to expose their assets to retroactive liability. This impediment can be addressed by (1) adopting and implementing a policy that avoids the imposition of new or changed requirements upon operations and in turn existing bonds placed before those requirements take affect; and (2) allowing an exclusion in the bond form that addresses this circumstance.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

THE WEST VIRGINIA HIGHLANDS CONSERVANCY,

Plaintiff,

v. CIVIL ACTION NO. 2:00-1062

GALE A. NORTON, Secretary of the Department of the Interior, and JEFFREY D. JARRETT, Director of the Office of Surface Mining;

Defendants, and

WEST VIRGINIA COAL ASSOCIATION,

Intervenor-Defendant.

MEMORANDUM OPINION AND ORDER

Pending is the motion of Plaintiff West Virginia Highlands Conservancy (WVHC) for summary judgment and a permanent injunction on Count 9 of its Second Amended and Supplemental Complaint. For reasons discussed below, the Court **DENIES** the motion without prejudice. Plaintiff's motion for summary judgment on approval by the Office of Surface Mining (OSM) of certain other state program amendments also pends. That motion is **GRANTED** in part and **DENIED** in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Surface Mine Control and Reclamation Act, 30 U.S.C. §§

1201 *et seq.*, (SMCRA) requires each applicant for a mining permit to submit a reclamation plan in sufficient detail to demonstrate compliance with the reclamation standards of the applicable regulatory program. 30 U.S.C. § 1257(d). Before mining can begin, SMCRA and its implementing regulations further require the applicant to file a bond in an amount "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture[.]" 30 U.S.C. § 1259(a); 30 C.F.R. § 800.14(b).

The statute allows an Alternative Bonding System (ABS): "[I]n lieu of the establishment of a bonding program, as set forth in this section, the Secretary may approve as part of a State or Federal program an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section." Id. at § 1259(c). Under the regulations, an ABS must "assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time." 30 C.F.R. § 800.11(e)(1).

West Virginia has an ABS consisting, first, of a site specific penal bond, not less than $1000 nor more than $5000 per acre. See W. Va. Code § 22-3-11(a). In addition, the State has a Special Reclamation Fund (SRF), which is funded by a tax on

clean coal mined in the state, forfeited bonds, interest income, and administrative penalties collected by the West Virginia Division of Environmental Protection (WVDEP).

Since 1988-89 the Office of Surface Mining (OSM) has known the State SRF lacked sufficient funds to reclaim all outstanding bond forfeiture sites. See 67 Fed. Reg. 37610 (May 29, 2002). In 1991 OSM notified the State that a program amendment was necessary to bring the ABS into conformity with SMCRA. In 1993 the State raised the per-ton tax from one to three cents. The fund remained in deficit. Finally, on June 29, 2001 and under pressure from this litigation, OSM issued a Part 733 notification[1] to the State that it was required to make statutory and regulatory revisions to conform the ABS to federal law. Otherwise, the Director would recommend the "Secretary of the Interior partially withdraw State program approval and implement a partial Federal regulatory program." (Admin. Record (AR), 2.)

In response, the WVDEP first proposed a plan called the "20/20 plan" that would raise the maximum per acre bonds to $20,000/acre and a 20 cents per ton tax. That plan was never presented to the Legislature, but was replaced by the "7-Up

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[1]30 C.F.R. pt. 733; see also 30 C.F.R. § 732.17(f)(2).

Plan," which increased the per ton tax to seven cents and added an additional increase of seven cents per ton for a period not to exceed thirty-nine months. The plan also required that the four cent per ton increase, i.e., the seven-cents/ton basic tax, could not be reduced "until the special reclamation fund has sufficient moneys to meet the reclamation responsibilities of the state[.]" W. Va. Code § 22-3-11(h)(2) (2002).

Along with the tax provisions, the amended ABS plan passed by the Legislature, signed by the Governor, and submitted to OSM includes an Advisory Council. W. Va. Code § 22-1-17. The eight member council consists of the WVDEP Secretary, State Treasurer, director of the national mine land reclamation center at West Virginia University, and five members appointed by the Governor using recommendations from 1) industry, 2) environmentalists, and 3) the United Mine Workers Association, as well as 4) an economist or actuary, and 5) a member to represent the general public. Id. at (b).

The statute requires the Advisory Council to study the "effectiveness, efficiency and financial stability of the SRF," and contract with an actuary to determine the SRF's fiscal soundness on January 31, 2004 and every four years thereafter. Id. at (f)(2). The Council is charged to study and recommend to

the Legislature alternative approaches to the current SRF funding scheme.[2] Id. at (f)(6). On January 1, 2003 and annually thereafter, the Council must submit a report to the Legislature on the adequacy and fiscal condition of the SRF, including a recommendation whether the tax needs to be adjusted. Id. at (g).

State program amendments cannot be implemented until OSM approves them. 30 C.F.R. § 732.17(g); W. Va. Code § 22-3-11(n). Following a public comment period, OSM approved the ABS program outlined above, so that the increased taxes could begin to be collected. The increase to 14 cents/ton was implemented January 1, 2002. But the agency bifurcated the decision process and reopened for public comment the question whether the amendments would "eliminate the deficit in [West Virginia's ABS] and ensure sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and

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[2]Because the Advisory Council is required to "[s]tudy and recommend to the Legislature alternative approaches to the current funding scheme of the [SRF,]" W. Va. Code § 22-1-17(f)(6), OSM interprets this to mean that the Advisory Council cannot rely solely on a coal production tax, but "must examine and recommend other funding mechanisms such as a sinking fund, insurance, trust fund, or escrow accounts to meet future bond forfeiture reclamation obligations." 67 Fed. Reg. at 37614.

future forfeiture sites."[3] 67 Fed. Reg. 37611. Over Plaintiff's objections, the Court approved that bifurcated process. WVHC v. Norton, 190 F. Supp.2d 859, 870 (S.D. W. Va. 2002).

On May 29, 2002, by notice in the Federal Register, OSM found the amendments to the State ABS would eliminate the Fund's $47.9 million deficit in about three years.[4] 67 Fed. Reg. 37613. Based on current coal production, the 14 cents/ton tax will increase cash flow into the SRF by about $1.8 million/month. Id. OSM earlier found these taxes would generate sufficient revenues to avoid deficit for about nine years, but future adjustments would have to be made to meet long-term needs of the SRF. Id. at 37611.

OSM recognizes "inaccuracies and gaps in the data currently available" on which these projections are based. Id. at 37613. For example, projected acid mine drainage ("AMD") costs are

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[3]This required program amendment is set forth at 30 C.F.R. § 948.16(111). A number of other program amendments at issue in this litigation are discussed *infra* at II.D.

[4]OSM acknowledges this conclusion is called into question by its concession that Plaintiff WVHC correctly identified a substantial error in its calculations. Even assuming OSM was correct in projecting water treatment liability would increase by only $230,000 per year, its spreadsheet did not apply that assumption beyond 2004. With this correction, OSM's "basic conclusion remains the same. The Fund will eliminate the deficit and retain a positive balance for a few years." 67 Fed. Reg. 37616 (emphasis added).

"gross estimates" only, id. and current estimates of the Fund's deficit may be in error, id. at 37614. If errors are found, "the Advisory Council must recommend changes to the Legislature and the Governor to assure that the deficit is eliminated in a timely manner." Id. OSM also acknowledges the Advisory Council recommendations do not ensure implementation because the Legislature and Governor must approve them before they take effect. For these reasons, OSM's approval of the ABS contains a caveat:

> In the event that the Legislature and the Governor do not approve the Council's recommendations, we will reevaluate the adequacy of the State's ABS and, if appropriate, provide notification to West Virginia under 30 CFR 732.17(c) and (e) that it must amend its program to restore consistency with Federal requirements. With this caveat, we are removing the required amendment at 30 CFR 948.16(111).

67 Fed. Reg. 37614.

WVHC moved for summary judgment on Count 9,[5] which alleges OSM's approval of the State ABS program and its failure to respond adequately to Plaintiff's public comments were arbitrary, capricious, and inconsistent with SMCRA. WVHC

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[5]Count 9 is found in the Second Amended and Supplemental Complaint, filed June 26, 2002. Count 9 also alleges the remaining required program amendments are inconsistent with and less effective than SMCRA and its implementing regulations.

requests the Court set aside OSM's approval and order OSM to take over the State's bonding program and to issue only site-specific, full cost bonds to cover the costs of reclamation. Plaintiff also requests the Court remand the bonding amendment to OSM with instructions to undertake immediately a full and complete site-specific analysis of all existing water and land reclamation liabilities, and then complete a thorough actuarial risk analysis of all State reclamation liabilities within two years. (Pl.'s Mem. in Supp. of Mot. for Summ. J.and Permanent Injunction at 26.)

II. DISCUSSION

A. Standard of Review

Under SMCRA, "[a]ny action subject to judicial review . . . shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." 30 U.S.C. § 1276(a)(1). Similarly, under the Administrative Procedures Act, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law." 5 U.S.C. § 706(2)(A).

When reviewing an agency's decision to determine if that decision was arbitrary and capricious, the scope of review is

narrow. The reviewing court must decide if the agency's decision was based on consideration of relevant factors and whether there has been a clear error of judgment. Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 287 (4th Cir. 1999). The Court must scrutinize OSM's activity to determine "whether the record reveals that a rational basis exists for its decision." Natural Res. Def. Council, Inc. v. EPA, 16 F.3d 1395, 1401 (4th Cir. 1993). Agency action would be arbitrary and capricious if the agency relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Hughes River, 165 F.3d at 287-88 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983)). While the inquiry must be searching and careful, the Court is not empowered to substitute its judgment for that of the agency. Id. (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974)).

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a

judgment as a matter of law. Fed. R. Civ. P. 56(c). The parties have agreed there are no issues of fact and these matters may be decided solely as a matter of law.

B. Alternative Bonding Systems

As explained above, under SMCRA site-specific bonds must be procured before mining begins and must be "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture[.]" 30 U.S.C. § 1259(a); 30 C.F.R. § 800.14(b). OSM may approve an ABS "that will achieve the objectives and purposes" of the site-specifc bond program. Id. at 1259(c).

The agency's regulations are essentially the same as the statute:

> OSM may approve, as part of a State or Federal program, an alternative bonding system, if it will achieve the following objectives and purposes of the bonding program:
>
> (1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time; and
> (2) The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

30 C.F.R. § 800.11(e).

Regulations for determining the reclamation bond amount

require it "[r]eflect the probable difficulty of reclamation, giving consideration to such factors as topography, geology, hydrology, and revegetation potential[.]" 30 C.F.R. § 800.14(a)(3). OSM's Handbook for Calculation of Reclamation Bond Amounts ("the Handbook") states that bond calculation should "reflect the 'worst case scenario,' i.e., the cost of reclaiming the site if the permittee forfeits the bond at the point of maximum cost liability, under the reclamation and operation plans approved as part of the permit. (AR 668-69.)

C. Is OSM's Finding the West Virginia ABS Achieves the Objectives and Purposes of the Site-Specific Bonding Program Arbitrary, Capricious or Otherwise Inconsistent with Law:
WVHC's Objections and OSM's Responses

WVHC complains the State ABS program OSM has approved is "obviously inadequate." By Plaintiff's account, OSM has abdicated its responsibility and relies on uncertain future actions by a virtually powerless advisory council, the Legislature and the Governor to assure the State program complies with federal law. Because OSM has approved the West Virginia ABS based on inadequate and incomplete data, insufficient and incorrect analysis, and without considering recent changes to state reclamation standards, potential bankruptcies of major coal producers, or costs of reclaiming

large mountaintop removal mining sites, WVHC contends OSM's decision cannot be deemed rational and must be disapproved.

According to WVHC, this "speculative, unsupported and incomplete methodology" contrasts with the requirement of site-specific bonding for a "careful pre-mining calculation of reclamation costs," which provides "certainty of funding." (citing 30 C.F.R. § 800.14). Plaintiff claims OSM only may approve an ABS that is fully sufficient, at the time of approval, to cover all potential defaults. OSM responds that "as long as the amendment provides a mechanism for remedying ABS inadequacies in a reasonable fashion, we can approve it as being consistent with 30 C.F.R. 800.11(e)." 67 Fed. Reg. 37614. WVHC counters that an ABS must assure adequate funding, not just provide a "'mechanism' for future elimination of the deficit and attainment of Fund solvency." (Pl.'s Mem. at 12.)

Within this general framework, WVHC raises a number of specific objections to the data and methodology OSM employed in reaching its decision to approve the West Virginia ABS. The Court proceeds by considering the specific objections and then placing them in context within the broader, more general concerns summarized above.

1. Future Water Treatment Cost Estimates

OSM's projection of future water treatment costs, the Fund's largest potential future liability, is also the parties' most substantial area of disagreement. The parties agree on one point: water treatment for pollutional discharges, including AMD, is a perpetual requirement. Initially, WVDEP used a figure of approximately $25 million as the cost for ongoing water treatment at active mine sites, then presumed a worst case scenario would incur a ten percent forfeiture rate. (AR 624-26.) On that basis, WVDEP proposed $2.46 million should be added annually as the projected water treatment costs. OSM rejected this projection, because it assumes that "almost all permits where acid mine drainage were being treated would be forfeited." 37 Fed. Reg. 37615. Instead, OSM used the historical figure for bonds forfeited in West Virginia that included water treatment costs of approximately $4.6 million over the twenty-year period, thus projecting an average annual increase of $230,000 per year.[6] Id. An additional

[6]Because of the difficulty in determining these costs and guaranteeing their future payment, OSM notes it recently published in the Federal Register an Advance Notice of Proposed Rulemaking seeking comments on what types of financial guarantees will best ensure adequate funding for the treatment of unanticipated long-term pollutional discharges, including acid or toxic mine draining, that develop as a result of surface (continued...)

consideration is whether sites with AMD are increasing. OSM represents that there is a declining trend from 1982 to 1996 in sites developing AMD. OSM agrees with WVHC, however, that the universe of sites with AMD has grown since 1982 and therefore:

> the reliance on historic data may not be the best tool for evaluating long-term needs. We agree that there is a need for more data and a rigorous data analysis. The State program amendment that we approved . . . provides for such actions through the tasks assigned to the Advisory Council.

Id. at 37616.

WVHC cites other problems with the water treatment cost projections to which OSM's responses are also noted:

- OSM relied on samples taken during the driest month of a record drought year. OSM counters the low flow raises treatment costs, so by using that data, it overstated estimated costs. 67 Fed. Reg. at 37617.

- OSM underestimated treatment costs by assuming existing treatment meets required Clean Water Act effluent standards, but at numerous sites, it does

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[6](...continued)
coal mining operations. 67 Fed. Reg. 35070 (May 17, 2002); 67 Fed. Reg. 46617 (July 16, 2002).

In response to OSM's discussion of these difficulties, Plaintiff claims OSM asserts "'the creation of an adequate bonding system' is 'infeasible,' indeed 'impossible,' to attain in states like West Virginia where long-term acid mine drainage has been created by mining operations." (Pl.'s Reply Mem. at 3 (quoting Fed. Defs.' Mem. at 7)). This quote is inaccurate. OSM said, "it is simply impossible to determine, at this moment, how much revenue is needed to pay for all reclamation costs, including water treatment, into infinity."

not. OSM responds WVHC is correct, but the data were used only to obtain "gross costs estimates for the entire universe of pollutional discharges at bond forfeiture sites." Id. at 37619.

- WVDEP limited treatment costs to passive treatment costs. OSM responds that is incorrect and, at any rate, passive systems may be used if funds are provided for continued maintenance and replacement. Id. at 37619.

- OSM and WVDEP improperly deleted active sites from the AMD inventory. OSM answers sites were only deleted from the active inventory if found to have no pollutional discharges, or moved to the bond forfeiture inventory if the permit was revoked. Id.

- OSM failed to reconcile Tetra Tech's calculation that long-term water treatment costs would be $2.6 billion after fifty years with WVDEP's estimate of less than $10 million per year. According to OSM, the Tetra Tech analysis was not intended to produce a valid cost for water treatment, but the calculations were "instead illustrative of the use of a methodology" and "did not reflect final determinations of unfunded costs." Id. at 37620.

Even if the current projections of water treatment costs prove to be inaccurate, OSM disagrees with WVHC that the funding problem for future water treatment would be solved by site-specific bonds. According to the OSM Handbook, AMD is characterized as an unanticipated cost:

> The initial calculation of bond amounts will not include remediation costs for events such as acid mine drainage and landslides that are not anticipated in the approved permit or reclamation plan. Should an unanticipated event occur, the regulatory authority must require a permit revision and adjust the bond

amount to include any additional reclamation costs. (AR 669.) When the AMD occurs, bond adjustment is required and authorities then face the dilemma of calculating an adequate, sum certain amount of money to satisfy a perpetual liability. (Fed. Defs.' Mem. in Opp'n at 9 n.5.) In this regard, site-specific bonding and the State ABS do not differ: the harm has occurred, but the money to rectify the problem must be determined, and collected, and may not be guaranteed.

This thumbnail summary of the parties' disagreement about projected water treatment costs reveals several aspects of the debate and the questions raised for the Court. Numerous technical considerations underlie these calculations and projections. The data employed currently is inadequate. OSM acknowledges this repeatedly.

> • As noted by some commenters, we recognize that there are inaccuracies and gaps in the data currently available. We are continually revising our acid mine drainage inventories. . . . Projected treatment costs at this time are gross estimates based on water treatment models, rather than individual site-specific designs of treatment systems. . . . To the extent that resources allow, we intend to work with WVDEP to assist the Advisory Council in obtaining the data it will need to do its job. 67 Fed. Reg. 37613.
>
> • We agree that there is a need for more data and a rigorous data analysis [concerning AMD sites]. 67 Fed. Reg. 37616.

> • We recognize that the current estimate of treatment costs is based on very limited data and a formula for estimating costs. WVDEP needs to collect data showing seasonal variation at sites requiring water treatment, and it must increase staff or hire contractors for site-specific designs of those treatment systems. Id.
>
> • We concur that the new Advisory Council must gather data and evaluate the adequacy of the Fund's ability to cover water treatment. Id.
>
> • Program liability cost estimates [for water treatment], derived from current WVDEP inventory data, are at best gross estimates that may either underestimate or overestimate the actual program liability costs. . . . However, we believe that WVDEP's inventory data will improve significantly over time as WVDEP gains new knowledge and experience and as it identifies the costs associated with planning, developing, installing, and treating bond forfeiture sites with AMD. Id. at 37617.

This is a partial compilation of OSM's acknowledgements that the available data on which its decision must be made are incomplete, insufficient, gross estimates, and model-driven projections. Further, OSM agrees its analysis is "not a substitute for an objective, professional, and rigorous actuarial analysis of the Fund and its reclamation obligations and costs." Id. at 37615.

Nonetheless, OSM advances two justifications: (1) WVDEP will continue to improve its data on current costs and estimates of future bond forfeiture land and water reclamation costs and (2) the Advisory Council is required by law to contract for an

actuarial analysis on a regular basis, the first to be completed by December 31, 2004. Because that date corresponds with the approximate time the SRF deficit will be eliminated by the enacted tax increases, see id., the professional actuarial analysis will be timely. Either the deficit will be eliminated or the Advisory Council can propose further remedial action.

Review of this debate shows OSM has responded to each concern raised by the commenters. While frequently acknowledging the truth of the commenters' observations, OSM nevertheless demonstrates the numbers used or projections made are rationally calculated and reasonable, based on agency expertise. There is pair of underlying presumptions, that WVDEP will improve its data collection and the quality of the data collected, while the Advisory Council will perform its statutory duties and recommend tax increases and alternative funding mechanisms, if needed. Part of the remedy Plaintiff seeks is that the Court order OSM to assume these duties, which are already mandated to be performed by State officials. The Court must accept the presumption that public officials will carry out their official duties lawfully, with appropriate dispatch and expertise, despite the previous noncompliance noted in West Virginia Highlands Conservancy v. Norton, 161 F. Supp.2d 676,

681-83 (S.D. W. Va. 2001).

Which figures will best predict water treatment costs into the indefinite future is obviously an exercise requiring geotechnical and actuarial skills as well as extensive data. WVHC offers one account; OSM responds with a different, but reasonable, determination. OSM acknowledges the need for more data and continued adjustment of the liability projections. The Court, too, would wish more certainty as to whether the current tax increase will solve the Fund's fiscal problems. But where it is not apparent the agency has been unreasonable, and its current approach is plausible, the Court must defer to the agency.

2. Land reclamation costs

The situation with regard to land reclamation cost projections parallels the issues raised concerning water treatment. For example, WVHC claims OSM underestimated liabilities; OSM responds that, while acknowledging the need for better data, the current estimate represents the best estimate available. OSM acknowledges money already spent on sites where reclamation is not complete was not included in the per-acre reclamation figure, but conversely, not all currently disturbed acreage will require backfilling and grading, the most expensive

component of land reclamation.

Similarly, WVHC raised objections to calculations and projections to which OSM responded:

- Reclamation costs at three sites alone (Omega, T&T, and Royal Scot) exceed the State's entire $27.9 million estimate for all land reclamation. OSM responds land reclamation at Omega is completed, T&T land reclamation liability is $105,000 and Royal Scot is $6.2 million. 67 Fed. Reg. at 37621.

- The Bragg[7] consent decree will increase significantly future land reclamation costs. According to OSM, limits on the extent of disturbed area and spoil placement under the consent decree will help control reclamation liability post-Bragg. Id.

- The last three-year average net land liability figure of $3.9 million is inadequate and unjustified, particularly when year 2000 liability alone was $6.1 million. OSM answers the $3.9 million is the difference between the amount of the bond and the accrued liability for the permits revoked during a one-year period based on a three-year average. This historical rate on an annual basis is a good reference for future projections. Also, the average shortfall for the past five years was $4.3 million, making the State's estimate of $3.9 million reasonable. Id. at 37622.

- Historic costs are an inadequate basis for extrapolation because mountaintop removal (MTR) mines will greatly increase land reclamation costs. OSM agrees historic figures do not represent potential forfeiture costs for a large MTR mine, but believes that vigorous enforcement of contemporaneous reclamation requirements and site-specific bonds up to the $5,000 per acre limit will control costs and

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[7]Bragg v. Robertson, 83 F. Supp.2d 713 (S.D. W. Va. 2000).

encourage reclamation. Id. at 37623.

- The potential failure of a large mining company could be catastrophic producing massive reclamation liabilities. OSM replies such a failure might not mean the forfeiture of all its permits. Also failure of these large consolidated companies is less likely than the smaller undercapitalized ones generally forfeiting bonds. Finally, the Advisory Council will need to study these potential risks. Id.

- WVDEP failed to consider costs of reclaiming to the new commercial forestry standards nor deleting the older, less demanding requirements. In response, OSM relies particularly on the mechanism for future adjustments in revenues via the Advisory Council while noting that only a limited number of MTR mines will elect the forestry option. Id. at 37624.

As with the water treatment cost debate, WVHC makes good points and OSM provides reasonable responses. Each potential problem raised by Plaintiff has been addressed and the proffered answers are not implausible. Again and ultimately, the Court must defer to the agency's expertise.

3. Role of the Advisory Council

Plaintiff objects that OSM used the wrong legal standard in approving the amendment. OSM found that "the amendment provides a mechanism for remedying ABS inadequacies in a reasonable fashion." Id. at 37614. WVHC counters that OSM's reliance on the Advisory Council "mechanism" for future deficit elimination and fund solvency is inconsistent with SMCRA, section 1259,

which requires certainty of funding: "The amount of the bond shall be sufficient to assure the completion of the reclamation plan[.]" 30 U.S.C. § 1259(a). Providing a mechanism to handle these problems "does not provide the equivalent certainty of funding of a site-specific system." (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 14.)

Under the enabling regulation, an alternative bonding system "must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time." 67 Fed. Reg. 37614 (citing 30 C.F.R. § 800.11(e)). As OSM points out, the requirement is that sufficient money "be available," when there is a default and the areas must be reclaimed. The regulation does not require the money be available immediately. Further, the agency explains, even if somehow money could be made available immediately, manpower, machinery, logistics, planning and letting contracts would make it impossible to perform immediate reclamation on all areas currently in default.

This reading of the statute and regulation is plausible. Even a site-specific bond system will not set aside earmarked reclamation funds, but instead guarantees the bonding agency will draw on its sources of funds, and that they will be

adequate, if and when such withdrawals become necessary. Similarly, the West Virginia ABS sets aside tax (and other) monies at a rate projected to provide and guarantee sufficient funds for reclamation when needed. The current deficit is evidence of an inadequate rate, but not the inability of an ABS structured like that of West Virginia to provide sufficient funds, when needed. The inadequacy can be corrected by an adequate rate increase and a mechanism to ensure the rate keeps pace with reclamation needs, once the deficit is eliminated. Such a mechanism requires: improved data as to site-specific reclamation needs and default rates; ongoing reports of the SRF's fiscal condition; and actuarial analyses projecting the balance between reclamation needs and funds. The Advisory Council can provide all of these. The only thing it cannot do is adjust the rates; only the Legislature can adjust the tax rates. Again, however, the Court cannot assume the State authorities will not adjust rates when and if it becomes necessary. The current adjustment more than doubled the permanent tax rate and redoubled the rate for 39 months, both substantial increases, which evidences resolve to comply with the legal requirements at issue.

The required program amendment must eliminate the deficit

in the ABS and "ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites." 30 C.F.R. § 948.16(111)(emphasis added). WVHC argues Section 1259 mandates a detailed and comprehensive process that assures adequate money will be promptly available if a bond forfeiture occurs. (Pl.'s Mot. for Summ. J. at 10.) Site-specific bond calculation requires calculation of "the probable difficulty of reclamation, giving consideration to such factors as topography, geology, hydrology, and revegetation potential[.]" 30 C.F.R. § 800.14(a)(3). Such bonds must be adjusted where the bonded area increases or decreases or "where the cost of future reclamation changes." Id. at § 800.15(a). As discussed above, AMD is not an anticipated condition, so bonds must be adjusted when water treatment becomes necessary during mining. When mining-related water pollution occurs and perpetual treatment is necessary, the same uncertain calculations are required to adjust the site-specific bond as the ABS must make. For these reasons, according to OSM, "Estimating bond forfeiture rates and long-term water treatment obligations is a very speculative endeavor." 67 Fed. Reg. at 37615. "[T]here is simply no means to calculate a sum certain bond amount to cover the costs of

perpetual AMD treatment."[8] (Defs.' Mem. in Opp'n at 9.) Site-specific bonding, therefore, does not provide additional guarantees or upfront assurances that sufficient money will be available for reclamation. Both the site-specific and alternative bonding systems must project estimated costs into an uncertain future.

WVHC proposes that OSM's argument is simply a claim that statutory compliance is impossible, a claim courts frown upon. (Pl.'s Mem. in Reply at 4 (citing NRDC v. Train, 510 F.2d 692, 713 (D.C. Cir. 1974)).) As the discussion above explains, however, OSM does not claim impossibility, but rather equivalent difficulty under both the original statutory system and its alternative.

Given these difficulties, OSM argues there is only one way

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[8]In its reply, WVHC asserts that OSM administers a federal site-specific bonding program in Tennessee under which it calculates bonds sufficient to cover the cost of perpetual AMD treatment. (Pl.'s Mem. in Reply at 4 n.2, 7.) OSM replies, however, that it lacks statutory authority to establish interest-bearing accounts for any forfeited bonds and must therefore adjust and increase bond amounts sufficient only for a finite amount of time. In any event, no such temporally-limited bond increases have ever been submitted in Tennessee, due to administrative challenges to the Interior Board of Land Appeals, as well as litigation filed by the National Mining Association regarding the legality of requiring bonds to cover the cost of AMD treatment. (Defs.' Surreply at 2.)

to "ensure" a continuous, flexible stream of revenue to fund AMD and land reclamation costs in the future, considering the fluctuations in those costs due to factors such as higher postmining land use requirements, large company defaults, consolidation of companies, more stringent thresholds for determining approximate original contour, and compliance with Clean Water Act effluent limitations. The avenue to solution is increased tax collection in a system with a built-in adjustment mechanism so that, as these factors change, the tax rate can be incrementally adjusted. (Defs.' Mem. in Resp. at 13). The Advisory Council is the ABS's adjustment mechanism.

The new ABS does not differ in principle from the site-specific bond program, which also requires adjustment as conditions change and unforeseen difficulties arise. OSM's approval of the West Virginia ABS, based in part on the addition of the Advisory Council and the statutory requirements for data collection, reporting, and advice to the Legislature is not unreasonable or implausible.

4. OSM's Approval is not Arbitrary, Capricious, or Inconsistent with Law, but it is Contingent and Conditional

The Court has reviewed each of Plaintiff's objections and concluded that OSM's responses, calculations, and projections

are based on reasonable consideration of the relevant factors. While experts on either side differ, OSM has not provided any explanation so implausible that it could not be ascribed to differences of opinion, possibly compounded by the difficulties inherent in projecting scenarios incorporating new and untested variables. New mountaintop removal mining standards, industry consolidation, potential large-scale bankruptcy, and the current uncertainties of the bond market are some of the unknowns that may skew projections from historical data.

While better data that Plaintiff demands might sharpen the calculations, the surest test will be whether OSM's predictions play out in the near future. The increased tax at 14 cents per ton has been collected for a year. The first statutory deadline has passed: On January 1, 2003 and annually thereafter, the Advisory Council must submit a report to the Legislature on the adequacy and fiscal condition of the SRF, including a recommendation whether the tax needs to be adjusted. W. Va. Code § 22-1-17(g). The Court has not been informed whether this deadline was met. The Council's reports will establish if OSM's projections are correct that the SRF deficit is being reduced at a rate putting it on target to disappear in two more years.

The ultimate question is whether the ABS as now constituted

will work. Will it "eliminate the deficit in the ABS and ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites" as the amendment OSM is approving requires? 30 C.F.R. § 948.16(111). The ABS can work if the Advisory Council evaluates the Fund's fiscal situation, makes recommendations as necessary, and the Legislature and the Governor enact those recommendations. As all are aware, the question is, if more money is needed, will a sufficient tax hike be passed, i.e., will the mechanism work? That is the question OSM also left open:

> In the event that the Legislature and the Governor do not approve the Council's recommendations, we will reevaluate the adequacy of the State's ABS and, if appropriate, provide notification to West Virginia under 30 CFR 732.17(c) and (e) that it must amend its program to restore consistency with Federal requirements. With this caveat, we are removing the required amendment at 30 CFR 948.16(111).

67 Fed. Reg. 37614.

A caveat is a caution, a warning enjoining against certain practices. Webster's Third International Dictionary (Merriam-Webster 1981). OSM approves the West Virginia ABS only conditioned upon this caveat and contingent upon the State following the Advisory Council recommendations. This is an

important caveat because, as Plaintiff explains, the Advisory Council is powerless. OSM is not powerless, however, to right the situation if the State does not. Again the Court defers to the agency's expertise. While OSM's finding the ABS is sufficient at this time is not arbitrary nor capricious, neither is OSM's concern that the mechanism may not be allowed to work. For this reason, the Court also must condition its conclusion because if the Council is powerless and OSM does not exert its power, the Court would then be called upon to enforce the law.

Plaintiff's motion for summary judgment on Count 9 is **DENIED without prejudice** and the motion for injunctive relief is **DENIED** as moot. If OSM removes the caveat and unconditionally approves the ABS, the reasonableness of that action may be contested. Alternatively, either party may raise anew Count 9 on the grounds the caveat was warranted and the Advisory Council's recommendations are not being followed.

D. The Remaining Amendments

WVHC also challenged OSM's approval of certain non-bonding program amendments, codified at 30 C.F.R. §§ 948.16(dd), (tt), (xx), (nnn), (ooo), (sss), (vvv(2)), (iiii), (nnnn), and (oooo).

1. Amendments satisfied by policy statements or guidelines

A state may assume regulatory jurisdiction over surface coal mining and reclamation in the state only if it has an approved State program that includes "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of [SMCRA]" and "rules and regulations consistent with regulations issued by the Secretary pursuant to [SMCRA]." 30 U.S.C. §§ 1253(a)(1), (a)(7). Plaintiff objects to OSM's approval of eight of these amendments because WVDEP proposed policies and guidelines, rather than changes in State law or regulations, to remedy the problem OSM had previously identified.

For example, 30 C.F.R. § 948.6(dd) requires, in part, that West Virginia "must submit proposed revisions to Subsection CSR 38-2-9.3 of its Surface Mining Reclamation Regulations or otherwise propose to amend its program to establish productivity success standards for grazing land, pasture land and cropland[.]" In response, WVDEP developed a policy using productivity standards developed by the Natural Resources Conservation Service and other publications of the United States Department of Agriculture. 67 Fed. Reg. 21904, 21905 (May 1, 2002). OSM approved the amendment "because the proposed policy

establishes productivity success standards . . . that are no less effective than those standards set forth in 30 C.F.R. 816.116 and 817.116[.]" Id. at 21906.

WVHC objects that WVDEP's rules must be promulgated in accordance with the West Virginia Administrative Procedures Act (APA), W. Va. Code § 29A-1-1, et seq. The State SMCRA program requires that any forms, handbooks or similar materials having the effect of a rule are subject to the State APA. See W. Va. Code § 22-3-4(b)(1). The policies WVDEP offers to amend its state program were not so promulgated.

If a rule affects private rights, privileges or interests, it is a legislative rule and must be promulgated according to APA procedures or it "remains a nullity providing no one with a clear legal right to judicial relief." See W. Va. Code § 29A-1-2(i); Syl. pt. 1, Wheeling Barber Coll. v. Roush, 174 W. Va. 43, 321 S.E.2d 694 (1984). On the other hand, interpretive rules "do not create rights but merely clarify an existing statute or regulation." Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995); see also W. Va. Code § 29A-1-2(c). "Although they are entitled to some deference from the courts, . . . interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the

court[.]" Id. By allowing WVDEP to regulate surface mining by policy, WVHC argues, OSM is arbitrarily and capriciously sanctioning a practice that eviscerates the citizen enforcement provisions of SMCRA.

OSM responds the issue is whether West Virginia's surface mining program is consistent with the requirements of SMCRA. (Fed. Defs.' Mem. in Opp'n at 21-22 (citing 30 C.F.R. § 732.15 ("The Secretary shall not approve a State *program* unless, . . . [t]he *program* provides for the state to carry out the provisions and meet the purposes of this Act.")).) OSM has determined West Virginia's proposed amendments, "albeit consisting of augmentative policies and guidelines, are consistent with SMCRA and achieve the goal of overall program consistency." Id. at 22. Because "it is the states, not the federal government, that are to 'develop and implement a program to achieve the purposes of [SMCRA],'" Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001), the Court should defer to OSM's decision granting the State latitude to carry out its own program.

Neither party has submitted any authority explicitly addressing the issue of whether a State program may include augmentative policies and guidelines that do not have the force of law. OSM cites Alternative Fuels, Inc. v. Lujan, 1992 WL

279743 (D. Kan. 1992), finding OSM's approval of Kansas revegetation standards for surface coal mining was not arbitrary or capricious although the standards were embodied in guidelines. Alternative Fuels does not specifically address the issue whether guidelines, which are not law or regulation, may be part of a State program. Nor does it consider requirements under Kansas surfacing mining law for rule-making approval of such guidelines.

A "State program" is defined as "a program established by a State and approved by the Secretary pursuant to section 503 [30 U.S.C. § 1253] of the Act to regulate surface coal mining and reclamation operations . . . within that State, according to the requirements of the Act and this chapter." 30 C.F.R. § 701.5. While Section 503 requires that State law, rules and regulations be capable of carrying out the provisions of SMCRA, it does not require only rules and regulations comprise the State program.[9] "Program" is thus open and not limited as to its

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[9]Section 503, 30 U.S.C. § 1253, provides for the initial approval of a State surface mining program, during "the eighteenth-month [sic] period beginning on August 3, 1977[.]" 30 U.S.C. § 1253 (a). The statute does not speak to approval of amendments of previously approved State programs, which is dealt with by OSM regulation at 30 C.F.R. § 732.17.

WVHC argues OSM failed to make findings required by §§ (continued...)

extent or its composition. OSM has interpreted the term to include laws, rules, policies and guidance documents. 67 Fed. Reg. 21923. The agency points out that all portions of a program are subject to public review and comment and require OSM approval. Id. State program amendments include any "alterations" in the State program, according to OSM. Id. (citing 30 C.F.R. § 732.17(a)). OSM further instructs:

> If a State regulatory authority submits a policy, technical guidance, or written statement as a means of rendering the State program no less effective than the Federal regulations, that policy, technical guidance, or written statement, if approved by OSM, becomes part of the approved State program. If, after approval by OSM, the policy, technical guidance, or written statement subsequently changed [sic], it should be submitted to OSM as a State program amendment.

Id.

The Supreme Court has continually reaffirmed that an agency's interpretation of its own regulations is entitled to substantial deference. See, e.g., Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own

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[9](...continued)
732.15(b)(6) and (d). These findings relate to initial approval or disapproval of State programs under § 732.15, not their amendment under § 732.17 and are not required for program amendment.

regulations."); Stinson v. United States, 508 U.S. 36, 45, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993) ("[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."). The deference applies only to the extent the agency's rules are not contrary to the statute or regulation, and that question is one of law for the courts to determine *de novo*. See Public Employees Retirement System v. Betts, 492 U.S. 158, 171 (1989) (no deference due agency interpretation at odds with the statute).

As noted above, the statute does not limit the contents of a State program and it does not address State program amendment. Program amendment is addressed by agency regulations. OSM interprets a State program to include agency policies and guidance documents. This interpretation is not plainly erroneous or inconsistent with the regulation. Accordingly, the Court **DENIES** WVHC's motion to disapprove OSM's approval of West Virginia's amendments to its State program on the basis they are achieved through policy statements and guidance documents.

2. Inconsistent State law found consistent through preemption

OSM also determined four amendments, codified at 30 C.F.R. § 948.16(nnn), (ooo), (sss) and (oooo), were no longer required and could be removed. For example, the West Virginia statute includes unjust hardship as a criterion to support the granting of temporary relief from an order or other decision issued under the West Virginia Surface Coal Mining and Reclamation Act. W. Va. Code § 22B-1-7(d). Although WVDEP proposed an amendment to the West Virginia Code that was submitted to the Legislature, the proposal died in committee. 67 Fed. Reg. 21911. According to OSM, the current state statutory language is inconsistent with Sections 514(d) and 525(c) of SMCRA.

Nevertheless, OSM now reasons no amendment is necessary because the Supreme Court of Appeals of West Virginia has held that "When a provision of the West Virginia Surface Coal Mining and Reclamation Act . . . is inconsistent with Federal requirements in [SMCRA], the State Act must be read in a way consistent with the Federal Act." Canestraro v. Faerber, 179 W. Va. 793, 374 S.E.2d 319 (1988). The State Supreme Court also held that proposed changes to approved State programs do not take effect until approved as an amendment by OSM. See DK Excavating, Inc. v. Miano, 209 W. Va. 406, 409, 549 S.E.2d 280, 283 (2001). Finally, that court held state surface mining

regulations must be read in a manner consistent with federal regulations enacted in accord with SMCRA. Charles Schultz v. Consolidation Coal Co., 197 W. Va. 375, 475 S.E.2d 467 (1996). Based on these principles, OSM removed the four amendments at issue, declaring them satisfied.

According to OSM, because it has never approved the regulatory language at issue in the four amendments, that language has never taken effect. Moreover, under West Virginia Supreme Court case law interpreting federal law, state surface mining law must be read to be consistent with federal law. Therefore, although the language required to be amended is inconsistent with federal law, and OSM has declared it inconsistent with federal law, the amendments are no longer required because by law the State law is a nullity.

This Court previously considered this problem in West Virginia Highlands Conservancy v. Norton, 190 F. Supp.2d 859, 871 n.9 (S.D. W. Va. 2002). When WVDEP failed to respond to the required amendment at § 948.16(oooo), OSM defended the State agency action, arguing the failure had no legal consequences because the regulation was not law under the principles of Canestraro, Schultz, and DK Excavating, and so leaves no "hole" in the State program. Id. The Court found there were legal

consequences because the State regulations contained not a hole, but a "hump," a regulation that is not law. The resulting regulations were "confused, inaccurate, and misleading." Id.

Concerning the four amendments at issue here, which include (oooo), OSM now responds it is not charged with the task of ensuring that West Virginia's program is a model of clarity. (Fed. Defs.' Mem. in Opp'n at 23.) Rather, OSM is charged with ensuring the West Virginia program remains consistent with the federal scheme.

The West Virginia program is not consistent with the federal scheme in four areas noted by the required amendments at § 948.16(nnn)(West Virginia allows unjust hardship criterion); 948.16(ooo)(W. Va. Code § 22B-1-7(h) states the Environmental Quality Board hears appeals from actions taken under the State surface mining board; this is incorrect); § 948.16(sss)(State law and regulations allow waiver for replacement of water supplies that cannot be waived); and § 948.16(oooo)(State regulations allow special authorization for coal extraction incident to land development; federal law does not).

OSM's finding the four amendments have been satisfied because inconsistent State law is preempted by federal law allows a state program to directly contradict federal law and

yet be "consistent" with federal law. This is not rational or logical, but arbitrary. By this reasoning, a state program could contain any number of misstatements and misrepresentations of required federal surface mining law, yet by the operation of law, those areas would be replaced *sub silentio* with the correct law, which could be determined only by investigation of the Federal Register to ascertain which amendments OSM had not approved due to inconsistency, but allowed to remain in State law because OSM nevertheless declared it "consistent."

Under this system, the entire State surface mining law, statutes and regulations, would give the appearance of law but would have no effect. Application of each such apparition of law would require due diligence to determine its existence or counterpart in federal law. This undertaking is the duty imposed by statute and regulation on the agency. 30 U.S.C. § 1253(a)(1) and (7); 30 C.F.R. § 732.15. If State surface mining law is not consistent with federal law, OSM must require the State to amend it and may not arbitrarily and irrationally declare what is inconsistent to be consistent.

For these reasons, the Court **GRANTS** summary judgment for WVHC on its claim that OSM's approval of the four amendments required at § 948.16(nnn), (ooo), (sss), and (oooo) is

arbitrary, capricious and inconsistent with law. That agency decision is **VACATED** and the four amendments are remanded to OSM for reconsideration of its decision consistent with the requirements of SMCRA under the timetable provided in 30 C.F.R. § 732.17(f)(1) and (2).

III. CONCLUSION

WVHC's motion for summary judgment on Count 9 of the Amended and Supplemental Complaint is **DENIED** without prejudice. Plaintiff's motion for summary judgment on OSM's approval of State program amendments based on policy or guidance statements is **DENIED.** Plaintiff's motion for summary judgment on OSM's approval of State program amendments inconsistent with federal law because OSM finds them consistent through operation of law is **GRANTED**. OSM approval of the four amendments at § 948.16(nnn), (ooo), (sss), and (oooo) is **VACATED** and the amendments are remanded to OSM for reconsideration in light of this opinion and federal law.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record and post it on the Court's website at http://www.wvsd.uscourts.gov.

ENTER: January 9, 2003

Charles H. Haden II
United States District Judge

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